No. 17-1364	
Title:	**North Carolina, et al., Appellants** **v.** **Sandra Little Covington, et al.**
Docketed:	March 28, 2018
Lower Ct:	United States District Court for the Middle District of North Carolina
Case Numbers:	(1:15-CV-399)
Decision Date:	January 21, 2018

DATE	**PROCEEDINGS AND ORDERS**
Mar 26 2018	Statement as to jurisdiction filed. (Response due April 27, 2018) **Jurisdictional Statement** **Appendix** **Certificate of Word Count** **Proof of Service**
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Jun 28 2018	Adjudged to be AFFIRMED in part and REVERSED in part. **Opinion** per curiam. (Detached **Opinion**). Justice Thomas, dissenting. (Detached **Opinion**)
Jul 30 2018	JUDGMENT ISSUED.

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No. ___

In the
Supreme Court of the United States

STATE OF NORTH CAROLINA, *et al.*,
Appellants,

v.

SANDRA LITTLE COVINGTON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

JURISDICTIONAL STATEMENT

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March 26, 2018

QUESTIONS PRESENTED

After North Carolina's state districting plan was invalidated as a racial gerrymander, the North Carolina General Assembly repealed the plan and enacted into law a new districting plan (the "2017 Plan"). It is undisputed that the General Assembly did not consider race in designing the 2017 Plan. The district court allowed plaintiffs in the original lawsuit to assert new challenges to the 2017 Plan without amending their complaint, and then found that four districts failed to "cure" the racial gerrymandering violation. The district court also adjudicated state-law challenges—even though no plaintiff resides in any of the districts challenged on state-law grounds—and found that five districts violated state constitutional limits on mid-decade redistricting. Instead of allowing the General Assembly to enact a remedial plan, the court imposed a plan designed by a special master who was explicitly encouraged to consider race.

The questions presented are:

1. Whether the district court had jurisdiction to consider challenges to the 2017 Plan.

2. Whether the district court erred by finding that four districts were racially gerrymandered even though the legislature did not consider race.

3. Whether the district court erred by considering and substantiating a state-law challenge to five districts in which no plaintiff resides.

4. Whether the district court erred by refusing to allow the legislature to enact its own remedial plan.

5. Whether the district court erred by imposing a map that improperly considered race.

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

James Edward Alston; Marshall Ansin; Valencia Applewhite; Marvin Cornelous Arrington; Susan Sandler Campbell; Sandra Little Covington; Mark R. Englander; Viola Ryals Figueroa; Jamal Trevon Fox; Dedreana Irene Freeman; Claude Dorsey Harris, III; Channelle Darlene James; Crystal Graham Johnson; Catherine Wilson Kimel; Herman Benthle Lewis, Jr.; David Lee Mann; Cynthia C. Martin; Vanessa Vivian Martin; Marcus Walter Mayo; Latanta Denishia McCrimmon; Catherine Orel Medlock-Walton; Antoinette Dennis Mingo; Rosa H. Mustafa; Bryan Olshan Perlmutter; Julian Charles Pridgen, Sr.; Milo Pyne; Juanita Rogers; Ruth E. Sloane; Mary Evelyn Thomas; Gregory Keith Tucker; John Raymond Verdejo

Defendants:

The State of North Carolina; North Carolina State Board of Elections; Rhonda K. Amoroso, in her official capacity; Philip E. Berger, in his official capacity; Paul J. Foley, in his official capacity; Joshua B. Howard, in his official capacity; Maja Kricker, in her official capacity; David R. Lewis, in his official capacity; Joshua D. Malcolm, in his official capacity; Timothy K. Moore, in his official capacity; Robert A. Rucho, in his official capacity

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES v
INTRODUCTION 1
OPINION BELOW 4
JURISDICTION 4
CONSTITUTIONAL PROVISIONS INVOLVED 4
STATEMENT OF THE CASE 4
REASONS FOR SUMMARILY REVERSING OR NOTING PROBABLE JURISDICTION 13
I. The District Court Lacked Jurisdiction Over Plaintiffs' Challenges To The 2017 Plan 16
II. The District Court Erred In Concluding That The General Assembly Engaged In Racial Gerrymandering By Declining To Consider Race 20
III. The District Court Lacked Jurisdiction Over Plaintiffs' State-Law Challenges And Erred On The Merits 25
IV. The District Court Improperly Prevented The State From Enacting A Remedial Map 31
V. The District Court Inflicted On The State A Map That Improperly Considered Race In Lieu Of A Race-Neutral Legislative Map 34
CONCLUSION 36

APPENDIX

Appendix A

Memorandum Opinion and Order of the United States District Court for the Middle District of North Carolina, *Covington, et al. v. North Carolina, et al.*, No. 1:15-CV-399 (Jan. 21, 2018) App-1

Appendix B

Order of the United States District Court for the Middle District of North Carolina, *Covington, et al. v. North Carolina, et al.*, No. 1:15-CV-399 (Nov. 1, 2017)..... App-102

Appendix C

Defendants' Notice of Appeal, United States District Court for the Middle District of North Carolina, *Covington, et al. v. North Carolina, et al.*, No. 1:15-CV-399 (Jan. 23, 2018) App-119

Appendix D

Constitutional Provisions Involved (U.S. Const. amend. XIV, §1; N.C. Const. art. II, §5)..... App-121

TABLE OF AUTHORITIES

Cases

Abbott v. Perez,
No. 17-586 (U.S.) 25

Abbott v. Perez,
No. 17-626 (U.S.) 25

Ala. Legislative Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) 26

Already, LLC v. Nike, Inc.,
568 U.S. 85 (2013) 17

Bartlett v. Strickland,
556 U.S. 1 (2009) 24, 34, 35

Bethune-Hill v. Va. State Bd. of Elections,
137 S. Ct. 788 (2017) 21, 23

Burke v. Barnes,
479 U.S. 361 (1987) 17

Chapman v. Meier,
420 U.S. 1 (1975) 19, 21, 30, 34

Connor v. Finch,
431 U.S. 407 (1977) 14

Covington v. North Carolina,
316 F.R.D. 117 (M.D.N.C. 2016) 4, 5, 34

Covington v. North Carolina,
No. 15-CV-399, 2016 WL 7667298
(M.D.N.C. Nov. 29, 2016) 5

Growe v. Emison,
507 U.S. 25 (1993) 17, 33

Harris v. McCrory,
No. 13-cv-949, 2016 WL 3129213
(M.D.N.C. June 2, 2016) 19

Hunt v. Cromartie,
526 U.S. 541 (1999) 13, 18

Ketchum v. Byrne,
740 F.2d 1398 (7th Cir. 1984) 19

Large v. Fremont Cty.,
670 F.3d 1133 (10th Cir. 2012) 19

Lawyer v. Dep't of Justice,
521 U.S. 567 (1997) 31

Lewis v. Cont'l Bank Corp.,
494 U.S. 472 (1990) 17

LULAC v. Perry,
548 U.S. 399 (2006) 35

McGhee v. Granville Cty.,
860 F.2d 110 (4th Cir. 1988) 19

Miller v. Johnson,
515 U.S. 900 (1995) 21, 22

Milliken v. Bradley,
433 U.S. 267 (1977) 25

North Carolina v. Covington,
137 S. Ct. 1624 (2017) 5

North Carolina v. Covington,
137 S. Ct. 2211 (2017) 5

North Carolina v. Covington,
No. 16-649 (U.S.) 5

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,
551 U.S. 701 (2007) 16

Pennhurst State Sch. & Hosp. v. Halderman,
465 U.S. 89 (1984) 28, 29

Perry v. Perez,
565 U.S. 388 (2012) ..... *passim*

Reynolds v. Sims,
377 U.S. 533 (1964) 19, 33

Scott v. Germano,
381 U.S. 407 (1965) 31

U.S. Dep't of Labor v. Triplett,
494 U.S. 715 (1990) 21

United Pub. Workers of Am. (C.I.O.) v. Mitchell,
330 U.S. 75 (1947) 27

United States v. Hays,
515 U.S. 737 (1995) 26, 27

United States v. Osceola Cty.,
474 F. Supp. 2d 1254 (M.D. Fla. 2006) 19

Upham v. Seamon,
456 U.S. 37 (1982) 30

Williams v. City of Texarkana,
32 F.3d 1265 (8th Cir. 1994) 19

Constitutional Provision

N.C. Const. art. II, §5(4) 7, 25, 29, 30

Statutes

28 U.S.C. §1253 4

28 U.S.C. §2284 4

Other Authorities

13C Wright & Miller, *Fed. Prac. & Proc.* §3533.6 (3d ed. 2017) 17

North Carolina v. Covington,
No. 17A790 (U.S.) 12

Verified Complaint, *North Carolina State Conf. of NAACP Branches v. Lewis*,
Case No. 18CVS002322
(N.C. Super. Ct. Feb. 21, 2018) 30

Voter Search, North Carolina State Board of Elections, https://vt.ncsbe.gov/RegLkup 27

INTRODUCTION

After North Carolina's legislative districting plan was invalidated as a racial gerrymander, the General Assembly responded in what should have been the surest way to avoid the same result: It enacted a new districting plan without *any* consideration of race. While the General Assembly's decision to be race-neutral still could have permitted a vote-dilution claim, it should have taken any racial gerrymandering challenge off the table. A racial gerrymander occurs only when the legislature's predominant motive is race—and needless to say, a legislature that expressly refuses to take race into account cannot be predominantly motivated by race. The three-judge court quite remarkably held otherwise. Even though the General Assembly did not consider race at all in enacting the 2017 Plan, the court invalidated that plan as a racial gerrymander all the same—not because the legislature's predominant motive was race, but on the novel theory that the legislature failed to adequately remedy the "effects" of the prior racial gerrymandering violation.

That ruling is unprecedented. This Court has never endorsed a test for racial gerrymandering that looks only to the *effects* of a districting plan; to the contrary, this Court has repeatedly emphasized that racial gerrymandering (unlike vote dilution) is an *intent*-based claim. The fact that the three-judge court invalidated an earlier plan enacted by a different legislature does not change that bedrock principle. The question for the court should have been whether the 2017 General Assembly was predominantly motivated by race when enacting the 2017 Plan—and

everyone agrees that it was not. But the district court never even inquired into the legislature's intent. Instead, the court invented a brand-new racial gerrymandering cause of action for second-round plans, under which a legislature that does not consider race at all can still have its plan invalidated if its non-racial criteria produce a map that in some ways resembles a prior map drawn with an illicit motive. In other words, the court concluded that to "cure" a past racial gerrymander, a legislature must take race into account to ensure that its non-racial districting criteria do not produce a map that looks insufficiently different from a prior map. Indeed, the court ultimately purported to "remedy" the racial gerrymandering violation by imposing its own map *that expressly considered race*.

The finding of racial gerrymandering in a map drawn without consideration of race is just the tip of the iceberg when it comes to the flaws in the decision below. The court lacked jurisdiction to consider *any* challenges to the 2017 Plan, as plaintiffs refused to amend their complaint to challenge that new legislation after the 2011 Plan was repealed. To make matters worse, the three-judge court allowed plaintiffs to expand their case to bring state-law challenges that are jurisdictionally invalid three times over: Not only is there no properly pleaded claim challenging the districts attacked on state-law grounds, but no plaintiff even lives in those districts, and federal courts have no power to enjoin state districts on state-law grounds.

The district court's remedial order was just as flawed. The court imposed a map drawn by a special

master who was appointed to draw it before the court even found any violations, with the General Assembly expressly taken out of the process based on a misguided and unprecedented rule that legislatures have only one chance to remedy a racial gerrymander. Even setting aside that the General Assembly's first effort remedied the prior racial gerrymander in the most direct way possible—by redrawing the maps without considering race—the district court's one-bite-at-the-apple theory is profoundly misguided and ignores the bedrock rule that redistricting is the duty and responsibility of the State, not of a federal court. And the district court erred even more fundamentally by directing the special master to consider race in developing a substitute for a race-neutral map.

From the moment this Court remanded this case, the three-judge court misunderstood its role, acting as if it had a permanent receivership over North Carolina's redistricting process. But this is not a case in which the legislature was deadlocked and a federal court had no choice but to impose its own districting plan. The General Assembly repealed the defective law and enacted new districting legislation, and that new legislation is a duly enacted state law entitled to take immediate effect, not just one proposed map among many for a federal court to accept or reject, or to replace with an explicitly race-conscious map. The three-judge court's decision to invalidate duly enacted state legislation without enforcing core Article III prerequisites or identifying a federal constitutional violation is indefensible. This Court should note probable jurisdiction and reverse.

OPINION BELOW

The district court's opinion is available at 2018 WL 505109 and reproduced at App.1-101. The court's order appointing a special master is reproduced at App.102-118.

JURISDICTION

While the decision of the three-judge district court should be vacated for lack of jurisdiction, this Court has jurisdiction over this appeal under 28 U.S.C. §1253. The district court issued its judgment on January 21, 2018. Appellants filed their notice of appeal on January 23, 2018. App.119-20.

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause and relevant provisions of the state constitution are reproduced at App.121-122.

STATEMENT OF THE CASE

In 2011, the North Carolina General Assembly enacted a legislative districting plan. Four years later, after the plan had already been used in the 2012 and 2014 elections, plaintiffs filed suit in the U.S. District Court for the Middle District of North Carolina, alleging that 28 districts in the 2011 Plan were unconstitutional racial gerrymanders. *See Covington v. North Carolina*, 316 F.R.D. 117, 124 (M.D.N.C. 2016). Plaintiffs did not assert a vote-dilution claim under Section 2 of the Voting Rights Act ("VRA") or make any allegations based on the effects of the districts on minority voting strength.

The court granted plaintiffs' request for a three-judge district court, *see* 28 U.S.C. §2284, and in August 2016, the three-judge court invalidated the 2011 Plan.

Covington, 316 F.R.D. at 124. The court agreed with plaintiffs that race was the predominant factor in the design of each challenged district, and that the General Assembly's use of race was not "supported by a strong basis in evidence and narrowly tailored to comply with [the VRA]." *Id.* at 176. The court declined to require changes before the 2016 election, but ordered the General Assembly to enact a new districting plan before the next regularly scheduled election in 2018. *Id.* at 176-78. The State appealed to this Court. *See North Carolina v. Covington*, No. 16-649.

Three weeks after the 2016 election, and while the appeal was still pending in this court, the district court entered another remedial order, this time requiring the State to enact a new districting plan by March 15, 2017, and to hold special elections in the fall of 2017 in every modified district. *Covington v. North Carolina*, No. 15-CV-399, 2016 WL 7667298 (M.D.N.C. Nov. 29, 2016). This Court summarily affirmed the district court's original merits ruling, *North Carolina v. Covington*, 137 S. Ct. 2211 (2017), but summarily vacated its later-issued remedial order, *North Carolina v. Covington*, 137 S. Ct. 1624 (2017), explaining that the court failed to undertake the required equitable weighing process, instead "address[ing] the balance of equities in only the most cursory fashion." *Id.* at 1626.

On remand, the district court declined plaintiffs' request to again impose a special election, instead ordering the General Assembly to enact new "districting plans remedying the constitutional deficiencies with the Subject Districts" by September

1, 2017, and to file the newly enacted plan with the court within seven days. Order, ECF 180 at 8. The court ordered the State to file the entire legislative record for the new plan and to provide, "as to any district with a BVAP greater than 50%, the factual basis upon which the General Assembly concluded that the Voting Rights Act obligated it to draw the district at greater than 50% BVAP." *Id.* at 8-9.

The General Assembly complied. On August 28, 2017, the House of Representatives passed HB927, the House redistricting plan, and the Senate passed SB691, the Senate redistricting plan. Each bill was sent to the other chamber, and each chamber passed the other's bill on August 30, 2017. Both bills were ratified the next day, and the 2017 Plan thus officially became the duly enacted law of North Carolina. *See* Notice of Filing, ECF 184 at 1-2.

Appellants notified the court that the 2017 Plan had been enacted and provided all required legislative materials. *See id.* at 1-11. In response to the court's question about districts "with a BVAP greater than 50%," Order, ECF 180 at 9, appellants explained:

> Data regarding race was not used in the drawing of districts for the 2017 House and Senate redistricting plans. No information regarding legally sufficient racially polarized voting was provided to the redistricting committees to justify the use of race in drawing districts.

Notice of Filing, ECF 184 at 10-11.

One week later, without filing an amended complaint or a new lawsuit, plaintiffs filed four sets of "objections" to the 2017 Plan. The first set was the

only one that took issue with any districts that had been challenged and invalidated at previous stages of this litigation—specifically, SD21, SD28, HD21, and HD57. Although plaintiffs acknowledged that the General Assembly did not use any racial data while drawing and enacting the 2017 Plan, Pls.' Objs., ECF 187 at 31, they nonetheless contended that the new versions of those four districts "fail to cure the racial gerrymandering violations." *Id.* at 1.

The rest of plaintiffs' "objections" were brand-new, state-law complaints about districts that had never before been challenged in this litigation. As relevant here, plaintiffs argued that the General Assembly violated the state constitution's prohibition on mid-decade redistricting "by unnecessarily altering ... mid-decade" House Districts 36, 37, 40, 41, and 105. *Id.* at 37 (citing N.C. Const. art. II, §5(4)).

Appellants responded, explaining that "[b]ecause the claims asserted by all plaintiffs are directed at legislation that has now been repealed and replaced"—namely, the 2011 Plan—plaintiffs could no longer demonstrate any harm from that now-defunct plan, "rendering the case moot and divesting this Court of subject matter jurisdiction." Resp. to Pls.' Objs., ECF 192 at 21. Appellants further argued that the district court lacked jurisdiction to consider plaintiffs' state-law challenges. *Id.* at 21-27. And appellants explained that plaintiffs' challenges failed on the merits as well. *Id.* at 28-56.

The court held a hearing on plaintiffs' fully briefed objections on October 12, 2017. Later that day, the court directed the parties "to confer and to submit the names of at least three persons the parties agree are

qualified to serve as a special master," in order to "avoid delay should the Court decide that some or all of plaintiffs' objections should be sustained." Order, ECF 200. One week later, the court informed the parties that it was "concerned" that nine of the challenged districts "either fail to remedy the identified constitutional violation or are otherwise legally unacceptable." Order, ECF 202 at 1-2. But rather than definitively resolve that question, the court confirmed its intention "to appoint a Special Master," "[i]n anticipation of the likely possibility" that it would invalidate the 2017 Plan. *Id.* at 2. The court identified Professor Nathaniel Persily as the Special Master it intended to appoint. *Id.* at 3.

Appellants objected, explaining that before appointing a special master to craft a remedy, the court must first find a violation in need of a remedy. Opp. to Appointment, ECF 204 at 2-6. That rule carries particular force, they explained, in the redistricting context, where the legislature must be given an opportunity to enact a new districting plan when its existing one has been found deficient. *Id.* at 7-8. Because there was still time for the General Assembly to enact a new plan if the 2017 Plan were found deficient, appellants implored the court to definitively resolve that question *before* forcing the State to fund a special master's effort to draw provisional remedial maps. *Id.*

The court overruled appellants' objections, appointed Professor Persily as Special Master, and ordered him to "submit a report and proposed plans" by December 1, 2017. Order, ECF 206 at 5. The court reiterated that it "has serious concerns" that four

districts "fail to remedy the identified constitutional violation" in the 2011 Plan, and that the changes to five other districts "exceeded the authorization to redistrict provided in the Court's previous orders." *Id.* at 1-2. But the court still declined appellants' request to definitively rule on the validity of the 2017 Plan, maintaining that "[t]he State is not entitled to multiple opportunities to remedy its unconstitutional districts." *Id.* at 4.

In the meantime, the court authorized the Special Master to "hire research and technical assistants and advisors" and to "buy any specialized software reasonably necessary," and ordered that all salaries and expenses be paid by the State. *Id.* at 9. The court provided guidelines for the Special Master to follow in drawing his remedial maps. In striking contrast to the race-blind policy choice the General Assembly made, the court informed the Special Master that he "may consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders and otherwise complies with federal law." *Id.* at 8-9.

The Special Master filed a "Draft Plan" on November 13, 2017, and after making minor changes in response to plaintiffs' suggestions, issued his final recommended plan and report ("Special Master's Plan") on December 1, 2017. As to the four districts (SD21, SD28, HD21, HD57) that the district court suggested "fail[ed] to remedy" the "impermissible use of race that rendered unconstitutional the 2011 districts," *id.* at 1-2, the Special Master's redrawn versions did not differ significantly from the 2017 Plan in terms of traditional districting criteria. *See* Special

Master's Recommended Plan & Report, ECF 220 at 22-29. But the Special Master's Plan did noticeably differ in one respect: It produced four districts with BVAPs falling into a narrow range of 38.4% to 43.6%, as compared to the 42.3% to 60.8% range in the race-blind 2017 Plan. *Id.* at 22. The Special Master's Plan also restored five House districts (HD36, HD37, HD40, HD41, and HD105) to their 2011 Plan form, on the theory that redrawing those districts violated "the provision of the state constitution that prohibits redistricting more than once per decade." *Id.* at 3. The Special Master also changed 15 adjoining districts to account for his modifications, resulting in a total of 24 districts that differed from the 2017 Plan.

Appellants again objected, Resp. to Special Master's Recommended Plan & Report, ECF 224, and then made a final plea for prompt resolution, imploring the court to move up its hearing and rule on plaintiffs' objections before the General Assembly's next session, Br. in Supp. of Mot. to Expedite, ECF 227 at 1. The district court refused. Order, ECF 228. Almost one month later, on January 5, 2018, the court held a hearing on the Special Master's Plan. Two weeks later, on the very last business day before the Board of Elections had to begin assigning voters to districts for the 2018 elections, the court entered an order invalidating the 2017 Plan and requiring the State to implement the Special Master's Plan for the 2018 elections.

Beginning with the jurisdictional issues, the court ruled that plaintiffs' challenges were not moot because "federal courts *must* review a state's proposed remedial districting plan to ensure it completely

remedies the identified constitutional violation and is not otherwise legally unacceptable." App.26. The court then determined that it was empowered to address not just challenges to districts that were invalidated in the 2011 Plan, but also new, state-law challenges to previously unchallenged districts. App.33-37 The court also rejected the argument that it lacks jurisdiction to consider state-law claims, holding that it could exercise pendent jurisdiction in the interest of "judicial economy, convenience, fairness to the litigants, and comity." App.35.

Turning to the merits, the court invalidated nine districts—some as racial gerrymanders and some as state-law violations. In the first category were SD21, SD28, HD28, and HD57. The court made no finding that the General Assembly acted with an illicit motive in designing those districts—nor could it, given the undisputed fact that the General Assembly did not consider race. Instead, the court held that these four districts "fail to remedy the racial gerrymander that served as the basis for invalidating the 2011 version of those districts." App.37. While the court did not find or conclude that the General Assembly actually considered race, it nonetheless concluded that those districts "fail to completely remedy the constitutional violation" because "the General Assembly's efforts to protect incumbents by preserving district cores and through use of political data perpetuated the unconstitutional effects of the four districts that are the subject of Plaintiffs' racial gerrymandering objections." App.46; *see* App.50-66.

The court next ruled that HD36, HD37, HD40, HD41, and HD105 "violate the [state] constitutional

prohibition on mid-decade redistricting." App.67. While the court acknowledged that the North Carolina Supreme Court "has not addressed the scope of the General Assembly's authority to engage in mid-decade redistricting when a decennial districting plan is found to violate the Constitution or federal law," the court determined that the North Carolina Constitution "prohibits the General Assembly from engaging in mid-decade redistricting." App.67-68. Although the General Assembly had engaged in mid-decade districting only because the district court *invalidated* the duly enacted decennial plan, the court reached the topsy-turvy conclusion that because "a *court* may redraw only those districts necessary to remedy the constitutional violation" when "a court must draw remedial districts *itself*," state legislatures must labor under the same constraints when they are ordered to draw remedial maps. App.69 (emphasis added).

The court then adopted the Special Master's proposed maps in full, including all the reconfigurations of other districts that the Special Master deemed "necessitated" by undoing the General Assembly's purportedly "unnecessary" alterations, and ordered that the 2018 elections take place under the court-imposed plan.

Appellants filed an emergency motion to stay the court's order, *see* Emergency Motion, ECF 243, and filed an emergency stay application in this Court, *North Carolina v. Covington*, No. 17A790. The district court denied a stay, but this Court granted the application in part, staying the order "insofar as it directs the revision of House districts in Wake County

and Mecklenburg County"—*i.e.*, the districts invalidated on state-law grounds.

REASONS FOR SUMMARILY REVERSING OR NOTING PROBABLE JURISDICTION

When a federal court invalidates a districting plan, there are two well-trod paths to devising a replacement map. The preferred path is for the State to enact a new districting plan into law through its ordinary legislative process. If it does so, the new law supersedes the old one and moots the prior dispute; any voter with a constitutional objection to the new plan may challenge it in the same manner as any other state law, such as by filing an amended complaint or a new lawsuit. *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 544-45 (1999). A different set of rules applies if the State is unable to enact its own remedial plan, because of political "gridlock" or some other factor. In that case, the district court must impose a districting map as a remedial order, and typically does so by choosing among various maps submitted by the parties or proposed by a court-appointed special master, while still using the last legislatively enacted map as a starting point. *See, e.g.*, *Perry v. Perez*, 565 U.S. 388 (2012).

Here, the district court charted an unprecedented and indefensible third course. In compliance with the district court's order, the General Assembly repealed the invalidated plan and enacted the 2017 Plan into law. That new plan was not a mere "proposal" submitted by lawyers, but rather a duly enacted law of North Carolina, entitled to the same deference and presumption of constitutionality accorded to all state legislation. But instead of treating it as such, the

district court treated the 2017 Plan as if it were just a *proposed* remedial plan for violations identified in the earlier litigation that the court was free to accept, modify, reject, or ignore, without regard to the constitutional requirements and substantive standards that would govern a typical challenge to state legislation. In doing so, the court improperly relied on precedents that apply only when the legislature fails to act and the court is forced to take on the "unwelcome obligation" of imposing court-drawn maps. *Connor v. Finch*, 431 U.S. 407, 415 (1977).

The district court's basic misconception of its role lay at the root of its reversible errors. *First*, because the court failed to recognize the 2017 Plan as the duly enacted law of North Carolina, it improperly retained jurisdiction over a moot controversy. Once the General Assembly repealed and replaced the law that plaintiffs challenged in their complaint, the district court lacked power to act unless and until plaintiffs amended their complaint or filed a new one challenging the 2017 Plan (and satisfying the various prerequisites for Article III jurisdiction), which they refused to do.

Second, because the court believed it was "fashioning a remedy" rather than freshly evaluating the constitutionality of a new state law, it invalidated four districts as racial gerrymanders without finding that race was the predominant factor in the 2017 Plan in general or in the invalidated districts in particular. Instead, quite remarkably, the court faulted the General Assembly for *not* considering race, counterintuitively concluding that the legislature's

race-neutral criteria failed to adequately "eliminate the discriminatory effects of the racial gerrymander" that the court found infected the 2011 Plan. Needless to say, a legislature's decision *not* to consider race does not violate the Equal Protection Clause—and thus is no ground for invalidating a duly enacted state law.

Third, the court improperly allowed plaintiffs to expand their claims to include new and novel state-law challenges to five districts that were not challenged in the original complaint. Not only were those claims never properly pleaded, but no plaintiff even lives in those districts, and federal courts have no power to enjoin state districts on state-law claims, especially novel ones. The district court thus lacked jurisdiction over those claims three times over. And in all events, the court's state-law holding rests on a misguided interpretation of the state constitution that has no precedent in state law and puts the state constitution on a collision course with the federal law principle that politically accountable state actors have the predominant role in enacting legislative maps designed to eliminate constitutional problems.

Finally, even if some or all of the district court's merits ruling were to survive, its imposition of the Special Master's Plan still should be reversed. Not only did the district court improperly deprive North Carolina of its sovereign right to draw its own districts; it also inflicted on the State the very race-based districting that the General Assembly chose to eschew. By repeatedly rejecting appellants' pleas to give the General Assembly a chance to draw a new map that remedied whatever problems the court may perceive in the 2017 law, the court committed an

extreme remedial overreach that intruded upon North Carolina's sovereign right to redistrict. And by imposing on the State a remedial plan carefully crafted to achieve a particular racial breakdown, the court effectively forced on the State the very racial gerrymandering that the General Assembly strove to avoid. Thus, at a minimum, the district court's imposition of the Special Master's Plan should be vacated, and the legislature provided an opportunity to correct any constitutional flaws in the 2017 Plan.

In sum, the district court misunderstood its role and the posture of this case. The 2017 Plan is a duly enacted law of North Carolina entitled to the same deference and presumption of constitutionality accorded to all state legislation. The district court did not have the power to subject that legislation to an *ad hoc* "preclearance" process unconstrained by standing, mootness, sovereign immunity, the presumption of good faith, or other bedrock principles of constitutional law. And the district court certainly did not have the power to hold that the General Assembly violated the Equal Protection Clause by following this Court's admonition that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

I. The District Court Lacked Jurisdiction Over Plaintiffs' Challenges To The 2017 Plan.

The first fatal problem with the decision and order below is that the district court lacked jurisdiction to enter them. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article

III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Where, as here, a lawsuit challenges the validity of a statute, the controversy ceases to be "live" when the statute is repealed. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). If a challenged statute no longer exists, then absent unusual circumstances not present here (like actions capable of repetition yet evading review) there is no live controversy over the repealed law and a case challenging only the validity of the repealed statute must be dismissed as moot. *See, e.g.*, *Burke v. Barnes*, 479 U.S. 361, 363-64 (1987); 13C Wright & Miller, *Fed. Prac. & Proc.* §3533.6 (3d ed. 2017) ("Repeal ... moots attacks on a statute.").

That straightforward rule applies equally to redistricting legislation. In *Growe v. Emison*, 507 U.S. 25 (1993), for example, while a federal challenge to a state legislative plan was pending, a state court invalidated that same plan and adopted a new one of its own design. *Id.* at 35. This Court explained that when the "state court's plan became the law of Minnesota," the federal plaintiffs' "claims that the [old] plan violated the Voting Rights Act became moot." *Id.* at 35, 39. At that point, "the federal court was empowered to entertain the [federal] plaintiffs' claims relating to legislative redistricting only to the extent those claims challenged" the new plan. *Id.* at 36. And because plaintiffs had not amended their complaint to challenge that plan, their claims were moot. *Id.*

This Court reiterated the point in *Hunt v. Cromartie*, 526 U.S. 541 (1999). There, the legislature enacted a new districting plan (the 1998 plan) while the district court's order invalidating the prior plan (the 1997 plan) was on appeal to this Court. *Id.* at 546. This Court explained that the legislature's action normally would have mooted the challenge to the 1997 plan, but that the controversy remained live because "the State's 1998 law provides that the State will revert to the 1997 districting plan upon a favorable decision of this Court." *Id.* at 545 n.1. Had the legislature effectuated a non-contingent repeal (as the General Assembly did here), the case would have been moot. *Id.*

Here, plaintiffs' lawsuit challenged only the 2011 Plan, and those claims became moot when the legislature repealed the law creating the 2011 Plan and replaced it with the 2017 Plan. At that point, plaintiffs had two options: They could either amend their complaint to add challenges to the 2017 law or file a new lawsuit challenging it. Plaintiffs did neither. Instead, they pursued their challenges to the 2017 Plan only through "objections" pressed in a so-called remedial proceeding. But that is not an option Article III allows. The 2017 Plan is a duly enacted legislative act that replaces the 2011 Plan, and Article III requires that it be separately challenged via a complaint brought by plaintiffs with standing asserting specific claimed defects with the 2017 law.

The district court did not identify any exception to mootness or otherwise explain why the normal Article III rules would not apply. Instead, it relied on inapposite cases, including two from this Court.

App.25-26. In *Chapman v. Meier*, 420 U.S. 1 (1975), the legislature "failed to reapportion" after the 1970 census, *id.* at 10, and its efforts to enact a plan in 1973 were thwarted by a popular referendum, *id.* at 12. Because the legislature never enacted its own remedial plan into law, the mootness issue never arose. Similarly, in *Reynolds v. Sims*, 377 U.S. 533 (1964), the legislature did not enact any remedial plan for the upcoming 1962 election; it enacted only two provisional reapportionment plans "for the 1966 elections," neither of which took immediate effect. *Id.* at 543. The controversy over what districting plan would govern in 1962 therefore remained very much alive. *See id.* at 586-87.

The district court cited several lower court cases, App.26-27, but none involved the enactment of new districting plans; instead, they involved municipal maps, and remedial plans that the municipality did not enact into any kind of law, but just proposed directly to the court. *See Large v. Fremont Cty.*, 670 F.3d 1133 (10th Cir. 2012); *Williams v. City of Texarkana*, 32 F.3d 1265 (8th Cir. 1994); *McGhee v. Granville Cty.*, 860 F.2d 110 (4th Cir. 1988); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984).[1] There is a fundamental difference between a proposal to be considered by a court forced to impose its own remedial map and a redistricting map duly enacted

[1] The district court also cited *Harris v. McCrory*, No. 13-cv-949, 2016 WL 3129213 (M.D.N.C. June 2, 2016), but in that case—as in *Hunt*—the new plan was passed only on a contingent basis. The only potentially relevant case the court cited was *United States v. Osceola County*, 474 F. Supp. 2d 1254 (M.D. Fla. 2006), and no party raised the mootness issue there.

through legislation. A duly enacted redistricting map that repeals the earlier statute is a *new law*. Like any other law, it must be challenged in a new lawsuit (or an amended complaint) filed by a plaintiff with standing to challenge the specified aspects of that new legislation as unlawful.

The only conceivable explanation for excusing plaintiffs from having to plead their challenges to the 2017 Plan as new claims is to short-circuit the protections that apply to litigation by traditional methods. And that is precisely what happened here—the district court failed to consider threshold issues like standing, *see infra* Part III, abandoned ordinary rules of discovery and presentation of evidence, *see* Per Curiam Order, ECF 233, and subjected the 2017 Plan to a form of junior-varsity "preclearance" under which the court declared itself empowered to reject the plan without regard to the substantive standards that apply in typical challenges to state legislation, *see infra* Part II. The court's failure to dismiss this case as moot was therefore just part and parcel of the fundamentally flawed manner in which it conducted its entire "remedial" proceeding.

II. The District Court Erred In Concluding That The General Assembly Engaged In Racial Gerrymandering By Declining To Consider Race.

The district court's ruling should also be reversed on the merits, as its conclusion that the General Assembly engaged in racial gerrymandering by declining to consider race is incoherent and unprecedented. Any effort to invalidate duly enacted legislation must begin with the "heavy presumption"

that the law is constitutional and valid. *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990). That presumption applies with particular force in the redistricting context, as "reapportionment is primarily the duty and responsibility of the State," *Chapman*, 420 U.S. at 27, and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

Racial gerrymandering is an intent-based violation of the Equal Protection Clause. To prevail on a racial gerrymandering claim, a plaintiff must prove that the legislature had a discriminatory intent—*viz.*, that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 916. Unlike a vote-dilution claim, which focuses on the *effects* of a districting plan on voting rights, a racial gerrymandering claim focuses on the legislature's *intent*. As this Court recently put it, "the constitutional violation in racial gerrymandering cases *stems from the racial purpose of state action*," and the inevitable "harms that flow from racial sorting." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797-98 (2017) (emphasis added). Accordingly, the irreducible minimum of a racial gerrymandering claim is intentional racial sorting. Indeed, that is not just the irreducible minimum; it is the essence of the claim.

Here, there is no dispute that the General Assembly did *not* consider race *at all* when designing the 2017 Plan—not as a predominant motive, a secondary motive, or otherwise. That undisputed fact

should have been the end of the plaintiffs' racial gerrymandering challenges. To state the obvious, a legislature that declines to consider race is not predominantly motivated by race. The district court accepted plaintiffs' challenges nonetheless by asking the wrong question. Rather than ask whether "race was the predominant factor" in the drawing of the challenged districts (as this Court's cases require), it asked instead whether the new districts "eliminate[d] the discriminatory *effects* of the racial gerrymander" that led to the 2011 Plan being invalidated. App.38-39 (emphasis added).

That novel proposition is fundamentally incoherent. Initially, it bears repeating that the court was not reviewing a "proposed remedial districting plan," App.26; it was reviewing a duly enacted state law. The General Assembly responded to the district court's finding that racial motivation infected the 2011 Plan by repealing that plan and replacing it with new, race-neutral districting legislation. Accordingly, the question for the court should have been not whether the 2017 Plan "eliminate[d] the discriminatory effects of the racial gerrymander" in the 2011 Plan, but whether the challenged districts in the new legislation were themselves racially gerrymandered. Yet the district court never even asked—let alone made any findings on—whether "race was the predominant factor" in drawing any of those districts. *Miller*, 515 U.S. at 916.

Instead, the court asked whether the new legislature "eliminated the discriminatory effects" of the *prior* racial gerrymander. But it is the height of incoherence to ask whether the legislature eliminated

the discriminatory *effects* of an *intent*-based violation like racial gerrymandering. It is one thing to ask whether new legislation removes the discriminatory effects of previous legislation that was invalidated for having an improper effect (like in a vote-dilution case), for *effects* may be unwittingly carried over from one version of a law to another. But the only problem with the 2011 Plan that was adjudicated here flowed from the previous legislature's discriminatory *intent*: the stigmatizing "harms that flow from racial sorting." *Bethune-Hill*, 137 S. Ct. at 797. Accordingly, once the legislature enacted a new law with a race-neutral intent, "the discriminatory effects of the racial gerrymander" were, by definition, eliminated, as an individual cannot complain about the stigmatizing injury of being sorted on the basis of race if she was not placed in her district on the basis of race. Discriminatory intent is not indelibly ingrained in statutory text or lines on a map. It is a question of motive that turns on why the legislature enacted the law. If the districts were not drawn on the basis of race (and the court here did not find that they were), then the court had no basis to invalidate them.

In concluding otherwise, the court found fault with the General Assembly's use of certain traditional *non-racial* districting criteria—namely, "preserving district cores and relying on political data" to protect incumbents. App.50. But the court did not find that either of these criteria was used as a pretext or proxy for race. Instead, the court held that these otherwise-permissible criteria are suspect when used to draw a *remedial* map, and that the General Assembly was under an obligation to "ensure that its reliance on those considerations did not serve to perpetuate the

effects of the racial gerrymander." App.50. In other words, the court reached the head-scratching conclusion that to "cure" the past racial gerrymander, the General Assembly cannot ignore race altogether, but instead must examine its non-racial districting criteria to determine what racial impact they would have—*i.e.*, the legislature must once again district on the basis of race.

That is clear from the court's district-by-district analysis of the districts it invalidated, which focused not on whether the General Assembly was motivated by race in drawing those districts, but on whether the General Assembly made affirmative efforts to ensure that each district's BVAP was not "too high," or to move municipalities, precincts, and communities of interest around to ensure that the district's lines did not unintentionally correlate with race. *See, e.g.*, App.50-66. Likewise, when the court instructed the Special Master on how to draw his alternative maps, it specifically instructed that he "may consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders." App.111; *see* App.106-18. And the Special Master proceeded to produce new versions of the four challenged districts that all just happened to have BVAPs in a very tight range of 38.4% to 43.6%. *See* Special Master's Recommended Plan & Report, ECF 220 at 22; *cf. Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (holding that VRA does not require creation of a "crossover" district with 39% BVAP). The district court's protests notwithstanding, *see* App.49-50, there is no other way to understand its opinion than as holding that the

General Assembly engaged in racial gerrymandering by failing to consider race.

To state the obvious, declining to consider race is not a cognizable constitutional violation. And unless the court finds that a particular district actually violates the Constitution, the court has "no basis" to invalidate a district—let alone to replace a race-neutral district with a race-conscious one. *Perry v. Perez*, 565 U.S. 388, 398 (2012); *see also Milliken v. Bradley*, 433 U.S. 267, 282 (1977). By replacing duly enacted districts without finding any constitutional violation, the district court exceeded the scope of any remedial authority it had.[2]

III. The District Court Lacked Jurisdiction Over Plaintiffs' State-Law Challenges And Erred On The Merits.

The district court erred just as egregiously by invalidating five House districts on the theory that the General Assembly violated a state-law prohibition on mid-decade districting. *See* App.66-72 (citing N.C. Const. art. II, §5(4)). That ruling is erroneous for four reasons: There is no properly pleaded claim challenging those districts, no plaintiff even lives in those districts, federal courts have no power to enjoin state districts on state-law grounds, and the district court's novel interpretation of state law is wrong and would put state law on a collision course with federal-

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[2] This Court may wish to hold this case pending its disposition of *Abbott v. Perez*, Nos. 17-586 & 17-626, which presents the same basic question of what a legislature must do to "remedy" a prior finding of intentional discrimination on the basis of race.

law principles minimizing federal-court interference with state elections.

First, the district court never should have adjudicated plaintiffs' state-law challenges because they were wholly outside the scope of plaintiffs' original challenge to the 2011 Plan. They involved entirely different districts and an entirely new (and novel) theory. Indeed plaintiffs' state-law legal theory is, by its very nature, inapplicable to the 2011 Plan. While the district court had no basis to consider *any* challenge to the 2017 Plan absent an amended complaint, *see supra* Part I, whatever conceivable basis the court might have had to retain jurisdiction over challenges to districts that were previously invalidated as racial gerrymanders could not extend to never-before-raised state-law challenges to different districts that could not have been included in the original challenge to the 2011 Plan.

Second, because the original complaint did not include such challenges, it is no surprise (but still a fatal defect) that none of these plaintiffs has standing to bring them. This Court has repeatedly held that individuals do not have standing to challenge districts in which they do not reside. *United States v. Hays*, 515 U.S. 737, 744-45 (1995); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015). The original complaint included plaintiffs from each of the 28 districts challenged therein, but it quite understandably did not include any plaintiffs from the five districts that plaintiffs challenge only in the context of the 2017 Plan. Yet instead of filing an amended complaint adding new claims and new plaintiffs, the same plaintiffs who live in the 28

originally challenged districts brought these entirely different challenges to entirely different districts. Because plaintiffs do not reside in either the 2011 or the 2017 versions of HD36, HD37, HD40, HD41, or HD105, they are not proper parties "to invoke judicial resolution of the dispute." *Hays*, 515 U.S. at 743.[3]

In opposing appellants' stay application, plaintiffs did not deny that they lack standing. Instead, they made only the implausible argument that there is "no standing issue" because the district court was merely exercising its "independent duty" to assess the legality of the 2017 Plan. Stay.Opp.28 n.6. That argument again confuses judicially imposed districting plans with legislatively enacted ones. While courts forced to impose their *own* plans in the absence of a duly enacted legislative plan obviously have an "independent duty" to ensure those plans do not violate the law, *see Perry*, 565 U.S. at 396, federal courts decidedly do not have any "independent duty" or free-standing power to assess the legality of districting laws (or any other laws) duly enacted by a state legislature. Instead, federal courts are empowered to adjudicate challenges to state laws only if a plaintiff with standing files a lawsuit alleging that the challenged statute is constitutionally infirm. *See, e.g.*, *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947).

This fundamental difference between judicially imposed maps and legislatively enacted maps should

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[3] The districts in which plaintiffs reside are available in North Carolina's online voter registration database. *See Voter Search*, North Carolina State Board of Elections, https://vt.ncsbe.gov/RegLkup.

have been particularly clear given the nature of plaintiffs' state-law claims. Plaintiffs, in essence, claim that the legislature may redistrict only once a decade. Thus, plaintiffs' state-law merits theory critically depends on the 2017 Plan's status as a distinct legislative enactment. But the 2017 Plan's status as a distinct legislative enactment is precisely what makes an amended complaint brought by a plaintiff with standing essential. Plaintiffs' argument ultimately collapses on itself—if they were not challenging the districts that the district court invalidated, then nobody was, and the district court's *ad hoc* review of duly enacted state legislation suffers from Article III problems even more glaring than the standing problem plaintiffs strain to avoid.

Third, this insurmountable standing problem is not even the only insurmountable obstacle to plaintiffs' state-law challenges: The Eleventh Amendment forbids federal courts from enjoining state laws on state-law grounds. As to these five districts, the decision below is based *exclusively* on state law. The court did not hold that these districts (or their predecessor versions) were racially gerrymandered; it held only that the state legislature violated the state constitution by altering these districts mid-decade. But as this Court has squarely held, "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when—as here—the relief sought and ordered has an impact directly on the State itself." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984). The facts that plaintiffs' *federal* claims were properly in federal court, and that the Fourteenth Amendment abrogates state sovereign immunity as to those federal

claims, does not make any difference, as "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." *Id.* at 121. The district court therefore lacked jurisdiction to enjoin the State from using the 2017 Plan on state-law grounds.

Finally, the district court's interpretation of state law is simply wrong. The North Carolina Constitution says that districts drawn after a decennial census "shall remain unaltered until the return of another decennial census." N.C. Const. art. II, §5(4); App.122. While that rule is clear enough under ordinary circumstances, the provision does not say anything about the General Assembly's power to redistrict mid-decade when a federal court *invalidates* the State's duly enacted map. Everyone agrees that when that happens, the state constitution allows the General Assembly to alter districts to some extent. Everyone likewise agrees that "[t]he Supreme Court of North Carolina has not addressed the scope of the General Assembly's authority to engage in mid-decade redistricting when a decennial districting plan is found to violate the Constitution or federal law." App.68. At a bare minimum, that uncertainty should have sufficed to persuade the district court to decline to exercise jurisdiction over plaintiffs' novel state-law challenges, as it did with respect to plaintiffs' challenges under another provision of state law. App.72-77.

Instead, the district court crafted a rule that the legislature may not make changes to an invalidated map unless they are "necessary to remedy" whatever infirmity the federal court found. App.69. The court

purported to derive that constraint from this Court's admonitions that *federal courts* should avoid "unnecessarily interfer[ing] with state redistricting choices." App.68 (citing *Upham v. Seamon*, 456 U.S. 37 (1982)). But the fact that a federal court may not "substitute[] its own reapportionment preferences for those of the state legislature," *Upham*, 456 U.S. at 40, hardly compels the conclusion that a federal court may prohibit a state legislature from determining how best to effectuate its legitimate districting choices after a federal court has *invalidated* its existing map. After all, the whole point of cases like *Upham* is that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman*, 420 U.S. at 27. Accordingly, a federal court should not read state law to impose constraints on a legislature's ability to respond to a federal-court order unless state law does so in the absolute clearest of terms, which no one could plausibly claim is the case here.

In short, any state-law challenge must be filed in state court, where state judges familiar with the state constitution can address the unsettled question of how N.C. Const. art. II, §5(4) applies when a federal court invalidates a duly enacted map. Sure enough, after this Court granted a partial stay of the judgment below, a group of plaintiffs represented by the same counsel as plaintiffs here filed exactly that lawsuit in state court. *See* Verified Complaint, *North Carolina State Conf. of NAACP Branches v. Lewis*, Case No. 18CVS002322 (N.C. Super. Ct. Feb. 21, 2018). As that state-court lawsuit underscores, the federal court should not have adjudicated state-law claims asserted by plaintiffs without Article III standing.

IV. The District Court Improperly Prevented The State From Enacting A Remedial Map.

Even if this Court concludes that the district court did not err by invalidating the 2017 Plan, it should still vacate the court's imposition of the Special Master's Plan and allow the General Assembly to enact its own map. The district court repeatedly rejected appellants' pleas for a prompt ruling that would allow the General Assembly to act, instead using a novel one-bite-at-the-remedial-apple rule as an excuse to impose its own districting plan on the State. By doing so, the court intruded upon North Carolina's sovereign right to redistrict, in direct contravention of this Court's precedent.

Decades ago, this Court established a principle of federalism from which it has never wavered: Federal courts must allow States to remedy constitutional infirmities in their districting plans. *Scott v. Germano*, 381 U.S. 407 (1965). If a federal court invalidates a State's districting plan, the State itself must be provided "the opportunity to make its own redistricting decisions so long as that is practically possible and the State chooses to take the opportunity." *Lawyer v. Dep't of Justice*, 521 U.S. 567, 576 (1997). Only when the legislature is unwilling or unable to enact a new map may "a court ... take up the state legislature's task." *Perry*, 565 U.S. at 392.

The district court violated that bedrock rule. The court made crystal clear as early as October that it intended to invalidate the 2017 Plan. In fact, the court was so confident that it "likely" would reach that outcome that it took the "exceptional" step of appointing a special master to draw his own substitute

maps, and even ordered the State to foot the bill for his work. Order, ECF 202. At that point, the only option consistent with this Court's precedents and due respect for state sovereignty was to enter an injunction detailing the specific infirmities in the 2017 Plan. The General Assembly would have had time to enact a new districting plan that remedied those defects and to appeal to this Court on a relatively standard timeline. Indeed, appellants repeatedly implored the court to rule as quickly as possible to ensure that the General Assembly would have time to exercise its sovereign right to remedy any potential violation(s) in time for the 2018 elections. Instead, the district court refused to give the General Assembly a chance to enact a new map.

The court did so on the novel theory that States surrender their sovereign right to redistrict if their first attempt at a remedial map is unsuccessful—no matter how willing the State is to try again. In the district court's view, a State simply "is not entitled to multiple opportunities to remedy its unconstitutional districts." App.106; *see* App.77-78 n.10. The district court purported to divine that rule from this Court's decision in *Reynolds*, but *Reynolds* actually *forecloses* the district court's one-chance-only rule: The *Reynolds* Court invalidated the State's first attempt to draw remedial maps, yet made clear that the district court could intervene in future elections only if the "Legislature fail[s] to enact a constitutionally valid, permanent apportionment scheme." *Reynolds*, 377 U.S. at 587.

The district court's interference with the legislature's right to remedy any perceived problems

with the 2017 Plan also contravened this Court's guidance in *Growe*. There, parallel actions challenging Minnesota's congressional districts were filed in state and federal court, and Minnesota quickly conceded that the districts were unconstitutional. Although the State was ready and willing to enact a new plan, the federal court disabled it from doing so by enjoining the parties from "attempting to enforce or implement any order of the ... Minnesota Special Redistricting Panel." *Growe*, 507 U.S. at 30. The federal court then imposed a congressional plan designed by special masters. *Id.* at 31. This Court reversed, holding that the district court erred by wresting control of the redistricting process from the State. Reiterating that "the Constitution leaves with the States primary responsibility" for redistricting, this Court held that "a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34.

The district court's actions here are virtually indistinguishable. The court was well aware—and did not even dispute—that the General Assembly stood ready and willing to promptly carry out its sovereign duty as soon as the 2017 Plan was invalidated. *See* Opp. to Appointment, ECF 204 at 8. It simply refused to give the General Assembly the opportunity to do so. That refusal is impossible to reconcile with this Court's repeated admonishments that "reapportionment is primarily the duty and responsibility of the State." *Chapman*, 420 U.S. at 27. Indeed, the court's one-bite-at-the-remedial-apple rule smacks of a resurrected version of preclearance, essentially tagging any legislature that fails to

successfully navigate the landmines of redistricting law a permanent "bad actor" that forfeits its sovereign prerogative to redistrict.

V. The District Court Inflicted On The State A Map That Improperly Considered Race In Lieu Of A Race-Neutral Legislative Map.

The district court strayed even further afield in empowering the Special Master to craft, and then imposing on the State, a remedial map that was expressly race-conscious. The General Assembly made a deliberate decision *not* to sort voters on the basis of race, and neither the district court nor the Special Master had the power to override that decision. *See Perry*, 565 U.S. at 394. Indeed, the whole reason the district court invalidated the 2011 Plan is because it concluded that the General Assembly lacked "a strong basis in evidence" to believe that it needed to consider race to draw majority-minority districts to remedy a potential Voting Rights Act violation. *Covington*, 316 F.R.D. at 124. Yet the district court then concluded that the remedy for that unnecessary consideration of race was to replace the General Assembly's new race-blind districts with districts that just so happened to all have BVAPs ranging from 38.4% to 43.6%, Special Master's Recommended Plan & Report, ECF 220 at 22—in other words, to replace race-blind districts with crossover districts. *See Strickland*, 556 U.S. at 13.

That is not even an appropriate remedy for a VRA violation, *id.* at 21; *see also LULAC v. Perry*, 548 U.S. 399, 446 (2006) (opinion of Kennedy, J.), and it is a positively bizarre remedy for a racial gerrymandering violation. Indeed, it is hard to understand the district

court's decision as anything other than an effort to allow plaintiffs to achieve through the back door of a "remedial" proceeding precisely what they could never achieve directly—namely, to compel the State to employ racial quotas of plaintiffs' choosing. Accordingly, even assuming the decision below were right on the merits (and it is not), the court (once again) got the remedy wrong. At a minimum, this Court should correct that remedial overreach and give the General Assembly the right to draw a new constitutionally compliant map.

CONCLUSION

This Court should summarily reverse or note probable jurisdiction.

Respectfully submitted,

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March 26, 2018

TABLE OF APPENDICES

Appendix A

Memorandum Opinion and Order of the United States District Court for the Middle District of North Carolina, *Covington, et al. v. North Carolina, et al.*, No. 1:15-CV-399 (Jan. 21, 2018) App-1

Appendix B

Order of the United States District Court for the Middle District of North Carolina, *Covington, et al. v. North Carolina, et al.*, No. 1:15-CV-399 (Nov. 1, 2017)..... App-102

Appendix C

Defendants' Notice of Appeal, United States District Court for the Middle District of North Carolina, *Covington, et al. v. North Carolina, et al.*, No. 1:15-CV-399 (Jan. 23, 2018) App-119

Appendix D

Constitutional Provisions Involved (U.S. Const. amend. XIV, §1; N.C. Const. art. II, §5)..... App-121

Appendix A

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 1:15-CV-399

SANDRA LITTLE COVINGTON, et al.,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, et al.,

Defendants.

January 21, 2018

Before Wynn, *Circuit Judge*, and Schroeder, *Chief District Judge*, and Eagles, *District Judge*.

MEMORANDUM OPINION AND ORDER (Amended)

Per Curiam:

On August 11, 2016, this Court held that the North Carolina General Assembly unjustifiably relied on race to draw dozens of state Senate and House of Representatives district lines, in violation of the Equal Protection Clause of the Fourteenth Amendment. *Covington v. North Carolina* (*Covington I*), 316 F.R.D. 117 (M.D.N.C. 2016). The Supreme Court summarily affirmed, without dissent, that determination. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017) (mem.).

On August 31, 2017, the North Carolina General Assembly enacted Senate and House redistricting plans (the "2017 Plans") intended to remedy the constitutional violations. Plaintiffs, thirty-one North Carolina voters, lodged objections to 12 of the 116 proposed remedial districts, arguing that those districts failed to remedy the identified racial gerrymanders or were otherwise legally unacceptable. Finding 9 of Plaintiffs' 12 objections potentially had merit, this Court identified its concerns and appointed Dr. Nathaniel Persily of Stanford University as Special Master (the "Special Master") to assist the Court in evaluating and, if necessary, redrawing those 9 district configurations (the "Subject Districts") in light of the fast-approaching filing period for the 2018 elections. Thereafter, the Special Master filed draft reconfigurations of the 9 districts for the parties' consideration, invited and considered comments and objections from the parties, and revised his draft plan in light of those comments and objections.

On December 1, 2017, the Special Master submitted to the Court recommended remedial plans (the "Recommended Plans") for the Subject Districts, as well as a report explaining his process for drawing the Recommended Plans and why the Recommended Plans remedy the identified legal problems with the Subject Districts. As further explained below, after careful consideration of the 2017 Plans, the Special Master's report, and the parties' evidence, briefing, and oral arguments, we sustain Plaintiffs' objections to the Subject Districts, approve the Special Master's Recommended Plans for reconfiguring those districts,

reject Plaintiffs' challenge to one Senate district, and decline to consider Plaintiffs' remaining objections.[1]

I.

In early 2011, the North Carolina General Assembly set out to redraw state Senate and House districts to account for changes in population and demographic data revealed in the most recent decennial census. *See* N.C. Const. art. II, §§ 3, 5. As the appointed chairs of the redistricting committees in their respective chambers, Senator Robert Rucho and Representative David Lewis (collectively, the "Chairs"), both Republicans, led efforts to draw and enact legislative districting maps for use in state elections in North Carolina (the "2011 Plans"). *Covington I*, 316 F.R.D. at 126. To that end, Representative Lewis and Senator Rucho engaged the assistance of an outside expert, Dr. Thomas Hofeller, to draw the new Senate and House district maps. *Id.*

Senator Rucho and Representative Lewis instructed Dr. Hofeller to follow three "primary" criteria in drawing the new districting plans, all of which "centered around the creation of what the Chairs called 'VRA districts'"—geographically compact minority population centers for which there was some evidence of a history of racially polarized voting. *Id.* at 130. The first criterion required that Dr. Hofeller "draw all purported VRA districts to reach a 50%-plus-one [Black Voting Age Population ("BVAP")]

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[1] Plaintiffs do not lodge any objections to the remaining 104 districts redrawn in the 2017 Plans, and therefore, we have nothing before us that indicates the districts do not comply with our order.

threshold." *Id.* This instruction stemmed from Senator Rucho's and Representative Lewis's belief that the Supreme Court's plurality opinion in *Bartlett v. Strickland*, 556 U.S. 1 (2009), required that any district drawn to comply with the Voting Rights Act be majority-minority. *Id.*

Second, Senator Rucho and Representative Lewis directed Dr. Hofeller to draw the so-called "VRA districts" first. *Id.* at 131. This instruction derived from the North Carolina Supreme Court's opinions in *Stephenson v. Bartlett* (*Stephenson I*), 562 S.E.2d 377 (N.C. 2002) and *Stephenson v. Bartlett* (*Stephenson II*), 582 S.E.2d 247 (N.C. 2003), both of which sought to harmonize federal election law with the North Carolina Constitution's so-called "Whole County Provision," N.C. Const. art. II, §§ 3(3), 5(3), which requires that, where possible, legislative district lines adhere to county lines, *Covington*, 316 F.R.D. at 131-32. According to the Chairs, the *Stephenson* decisions required Dr. Hofeller to identify and draw any VRA districts first. *Id.*

Third, Senator Rucho and Representative Lewis instructed Dr. Hofeller to draw VRA districts "everywhere there was a minority population large enough to do so and, if possible, in rough proportion to their population in the state." *Id.* at 130. This instruction again derived from the Chairs' incorrect understanding of governing law. In particular, Senator Rucho and Representative Lewis errantly believed that the Supreme Court's decision in *Johnson v. De Grandy*, 512 U.S. 999 (1994), held that in order to comply with Section 2 of the Voting Rights Act, the number of majority-minority districts in a state must

be proportional to minority voters' share of the state's overall voting population. *Covington*, 316 F.R.D. at 133. Although the Chairs did not expressly instruct Dr. Hofeller to maximize the number of VRA districts, "the proportionality target functionally operated as a goal to maximize the number of majority-black districts." *Id.* at 134.

Senator Rucho and Representative Lewis further instructed Dr. Hofeller that *any* districting proposal had to comply with these three "primary" criteria, two of which—the 50%-plus-one target and the proportionality goal—amounted to "'mechanical racial targets.'" *Id.* at 135 (quoting *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267 (2015)). In accordance with Senator Rucho's and Representative Lewis's instructions, Dr. Hofeller first "drew VRA 'exemplar districts,' which were 'racially defined' in that they embodied nothing more than 'concentrations of minority voters' capable of constituting a district that could satisfy the 50%-plus-one BVAP threshold." *Id.* at 135 (quoting Trial Tr. vol. IV, 228:5-12 (Hofeller); Trial Tr. vol. V, 104:4-105:1 (Hofeller)). By drawing, where feasible, district lines around the black population centers identified in the "exemplar districts," Dr. Hofeller then constructed as many majority-black districts as possible. *Id.* at 136-37.

Because the Chairs had instructed Dr. Hofeller that the three "primary" criteria could not be compromised, in drawing the districting plans Dr. Hofeller subordinated other race-neutral districting principles such as preserving political subdivisions and communities of interest, compactness, and complying with state districting laws such as the

Whole County Provision. *Id.* at 137-39. As a result of the decision to adhere to the Chairs' mechanical racial targets over traditional race-neutral districting principles, the number of majority-black districts in Dr. Hofeller's proposed state House map increased from nine to thirty-two. *Id.* at 126, 134, 137. Similarly, the number of majority-black districts in the proposed state Senate map increased from zero to nine. *Id.* at 126. The state Senate and House considered and adopted, with minor modifications, the 2011 Plans on July 27 and 28, 2011, respectively. *Id.*

Soon after the General Assembly approved the 2011 Plans, North Carolina voters filed actions in state court alleging that the lines of numerous legislative districts enacted by the General Assembly amounted to unconstitutional racial gerrymanders, in violation of the North Carolina and United States Constitutions. *See Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014), *vacated*, 135 S. Ct. 1843 (2015) (mem.). A divided Supreme Court of North Carolina held that both the Senate and House districting plans satisfied all "state and federal constitutional and statutory requirements." *Dickson*, 766 S.E.2d at 260. In April 2015, the Supreme Court of the United States unanimously vacated the state court's ruling without opinion and remanded the case for reconsideration of the federal constitutional and statutory questions presented in light of the Supreme Court's recent decision in *Alabama Legislative Black Caucus. Dickson*, 135 S. Ct. 1843. On remand, the Supreme Court of North Carolina again concluded that the 2011 Plans complied with federal law. *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015), *vacated*, 137 S. Ct. 2186 (2017).

While litigation in state court continued, Plaintiffs initiated this action in May 2015. *Covington I*, 316 F.R.D. at 128. As in the ongoing state court action, Plaintiffs alleged that districts in the 2011 Plans constituted racial gerrymanders and thus violated the Fourteenth Amendment of the U.S. Constitution. First Am. Compl. at 2, July 24, 2015, ECF No. 11. To remedy the alleged constitutional violation, Plaintiffs sought an injunction barring further use of the challenged districts in the 2011 Plans and requiring the General Assembly to adopt constitutionally compliant plans for use in any future elections. *Id.* at 92-93. Plaintiffs named as Defendants: (1) the State of North Carolina; (2) Senator Rucho, Representative Lewis, President Pro Tempore of the North Carolina Senate Philip E. Berger, and Speaker of the North Carolina House of Representatives Timothy K. Moore (collectively, the "Legislative Defendants"); and (3) the North Carolina State Board of Elections, as well as each of the five members of that body (collectively, the "Board Defendants").

On August 11, 2016, this Court unanimously concluded that Defendants unjustifiably, and therefore unconstitutionally, predominantly relied on race in drawing the lines of twenty-eight majority-minority districts in the 2011 Plans. *Covington I*, 316 F.R.D. at 176. In particular, this Court concluded that Defendants lacked a "strong basis in evidence" for their belief that race-based districting was necessary to comply with Section 2 of the Voting Rights Act because Defendants never analyzed whether, for each challenged district, the presence of "racial bloc voting ... would enable the majority usually to defeat

the minority group's candidate of choice." *Id.* at 167 (citing *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986)). On June 5, 2017, the Supreme Court summarily affirmed, without dissent, this Court's judgment that the Senate and House districting plans violated Plaintiffs' rights under the Fourteenth Amendment. *Covington*, 137 S. Ct. 2211. Notwithstanding that this Court had found the district lines violated the Constitution in August 2016 and that the Supreme Court affirmed that conclusion in early June 2017, the General Assembly made no effort to begin drawing remedial districting plans until late July 2017.

After obtaining jurisdiction from the Supreme Court, this Court received evidence, briefing, and argument regarding the appropriate remedy for the constitutional violations. In an order entered on July 31, 2017, this Court gave the General Assembly until September 1, 2017, "to enact new House and Senate districting plans remedying the constitutional deficiencies" with the districts found unconstitutional in this Court's August 2016 opinion and order. *Covington v. North Carolina* (*Covington III*), — F. Supp. 3d. —, 2017 WL 3254098, at *3 (M.D.N.C. 2017). This Court advised that it would extend this deadline until September 15, 2017, if the General Assembly made certain showings regarding the public nature of its redistricting process. *Id.* The order further explained that the Court selected the September deadlines to ensure that it would have adequate time "(1) to review the General Assembly's enacted remedial district plans, and (2) if the enacted plans prove constitutionally deficient, to draw and impose its own remedial plan." *Id.* In the same order, and as further explained in a subsequent opinion, this Court

denied Plaintiffs' request for a special election. *Id.* at *2; *see also Covington v. North Carolina* (*Covington IV*), — F. Supp. 3d. —, 2017 WL 4162335 (M.D.N.C. 2017).

Electing not to make the public showings necessary to obtain an extension of the deadline, the General Assembly's Senate Redistricting Committee and House Select Committee on Redistricting (collectively, the "Joint Committee") put in place a streamlined process designed to ensure enactment of remedial plans in advance of the September 1, 2017 deadline. Representative Lewis and Senator Ralph Hise, who had replaced Senator Rucho as chair of the Senate Redistricting Committee, again engaged Dr. Hofeller to assist the Joint Committee's Republican supermajority in drawing the remedial maps.

The Joint Committee met on August 10, 2017, during which Representative Lewis and Senator Hise proposed the following criteria to govern the drawing of the remedial district plans:

> *Equal Population*. The Committees shall use the 2010 federal decennial data as the sole basis of population for drawing legislative districts in the 2017 House and Senate plans. The number of persons in each legislative district shall comply with the +/- 5 percent population deviation standard established [*Stephenson I*].
>
> *Contiguity*. Legislative districts shall be comprised of contiguous territory. Contiguity by water is sufficient.
>
> *County Groupings and Traversals*. The Committees shall draw legislative districts

within county groupings as required by [*Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*]. With county groupings, county lines shall not be traversed except as authorized by *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*.

Compactness. The Committees shall make reasonable efforts to draw legislative districts in the 2017 House and Senate plans that improve the compactness of the current districts. In doing so, the Committees may use as a guide the minimum Reock ("dispersion") and Polsby-Popper ("perimeter") scores identified by Richard H. Pildes and Richard G. Neimi in *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993).

Fewer Split Precincts. The Committees shall make reasonable efforts to draw legislative districts in the 2017 House and Senate plans that split fewer precincts than the current legislative redistricting plans.

Municipal Boundaries. The Committees may consider municipal boundaries when drawing legislative districts in the 2017 House and Senate plans.

Incumbency Protection. Reasonable efforts and political considerations may be used to avoid pairing incumbent members of the House or Senate with another incumbent in legislative districts drawn in the 2017 House

> and Senate plans. The Committees may make reasonable efforts to ensure voters have a reasonable opportunity to elect non-paired incumbents of either party to a district in the 2017 House and Senate plans.
>
> *Election Data.* Political considerations and election results data may be used in the drawing of legislative districts in the 2017 House and Senate plans.
>
> *No Consideration of Racial Data.* Data identifying the race of individuals or voters shall not be used in the drawing of legislative districts in the 2017 House and Senate plans.

Adopted Criteria for House and Senate Plans, Sept. 7, 2017, ECF No. 184-37.

During the hearing, Democratic members of the Joint Committee objected to the Incumbency Protection criterion as likely to perpetuate the effects of the racial gerrymander by protecting incumbents elected under the racially gerrymandered plans. *See, e.g.*, Joint Select Comm. On Redistricting Meeting Tr. 120:9-121:9, Aug. 10, 2017, ECF No. 184-9 ("[I]t seems just ridiculous to me that [the Republican majority] would get to now say we get to protect the members that we were able to elect using unconstitutional maps."). Likewise, Democratic Joint Committee members expressed concern with the "Election Data" criterion on grounds that the purpose of using such data was unclear and that such data would be used to preserve the partisan makeup of the two chambers achieved under the unconstitutional districting plans. *See, e.g., id.* at 134:13-139:2. In the course of the discussion on the use of Election Data, Representative

Lewis represented that the Joint Committee's Republican leadership did not "have a goal of maintaining the current partisan advantage in the House and the Senate." *Id.* at 138:15-21. And Democratic Joint Committee members objected to the criterion barring consideration of "racial data" on grounds that it was necessary to consider such data to determine whether remedial plans remedied the racial gerrymander. *See, e.g., id.* at 151:6-11 ("[I]f the districts were declared unconstitutional because of race, if you don't use race to correct it, how are you going to show the Court that they still are not unconstitutional?").

The Joint Committee unanimously adopted the Equal Population and County Groupings and Traversal criteria. Leg. Defs.' Resp. to Pls.' Objs. ("Leg. Defs.' Objs. Resp.") 8-10, Sept. 22, 2017, ECF No. 192. The remaining seven criteria were adopted by party-line votes. *Id.* Representative Lewis and Senator Hise directed Dr. Hofeller to follow the adopted criteria in drawing the remedial maps, but the Committee provided Dr. Hofeller with no formal guidance as to the relative precedence of the various criteria. House Select Comm. On Redistricting Meeting Tr. 62:4-6, Aug. 25, 2017, ECF No. 184-18. Legislative Defendants did not introduce any evidence regarding what additional instructions, if any, Representative Lewis or Senator Hise provided to Dr. Hofeller about the proper use and weighting of the various criteria. Nor did they offer any evidence as to how Dr. Hofeller weighted or ordered the criteria in drawing the proposed remedial maps, either in general or as to any particular district.

The General Assembly released Dr. Hofeller's proposed Senate and House Plans on August 19 and 20, 2017, respectively. The General Assembly provided block assignment files and statistical information regarding the 2017 Plans on August 21, 2017. The 2017 Plans altered a total of 116 of the 170 state House and Senate districts. On August 22, 2017, the Joint Committee held a public hearing on the proposed plans in Raleigh, allowing attendees at six satellite locations to participate via teleconference. The Committees also received thousands of public comments through the General Assembly's website.

On August 23, 2017, Plaintiffs sent a letter to the House Select and Senate Committees on Redistricting and Defendants' counsel raising the following objections to the 2017 Plans: (1) several of the proposed districts failed to remedy the racial gerrymander; (2) the plans, when analyzed as a whole, amounted to "grossly unconstitutional partisan gerrymanders" in violation of the Equal Protection Clause; (3) the House plan's reconfiguration of certain districts in Mecklenburg and Wake County untainted by the racial gerrymander violated the North Carolina Constitution's prohibition on mid-decade redistricting; and (4) proposed district configurations in Cabarrus and Greene Counties violated the North Carolina Constitution's requirement that, where possible, state legislative districts respect county lines. Letter to Counsel, Sept. 15, 2017, ECF No. 187-1. Plaintiffs also provided the Committees with alternative maps that addressed Plaintiffs' objections, and Democratic representatives offered those maps as amendments during the legislative process.

The Committees did not revise the proposed remedial plans to address Plaintiffs' objections and rejected Plaintiffs' alternative redistricting plans. By party-line vote, the Senate Redistricting Committee approved Dr. Hofeller's proposed Senate plan on August 24, 2017. The House Redistricting Committee approved Dr. Hofeller's proposed House plan on August 25, 2017, also by a party-line vote. The General Assembly adopted, with minor modifications, both 2017 Plans on August 31, 2017.

One week later, Legislative Defendants filed with this Court the 2017 Plans and supporting data and materials required by the Court's July 31 order, including the complete legislative record. On September 15, 2017, Plaintiffs filed objections to 12 of the 116 redrawn districts, alleging essentially the same violations that they had identified in their August 23, 2017 letter to Defendants and the Committees. Objs. ("Pls.' Objs."), Sept. 15, 2017, ECF No. 187. Along with their objections, Plaintiffs filed several supporting records, affidavits, and expert analyses. One week later, Legislative Defendants responded to Plaintiffs' objections, asserting that this Court was without jurisdiction to consider the objections and that the objections otherwise were without merit. *See generally* Leg. Defs.' Objs. Resp. The State of North Carolina and Board Defendants (collectively, the "State Defendants") took no position on Plaintiffs' objections.

On October 12, 2017, this Court held a hearing on Plaintiffs' objections. This Court gave Legislative Defendants the opportunity to introduce evidence—in addition to the legislative record, data, and other

materials submitted in accordance with the Court's July 31, 2017 order—and present witnesses to establish that the General Assembly's proposed remedial plans cured the identified constitutional violations and were not otherwise legally unacceptable. Legislative Defendants elected not to offer any such evidence, either in written submissions or at the hearing.

That same day, the Court issued an order directing the parties to confer and, if possible, jointly submit a list of three persons qualified to serve as a special master under Federal Rule of Civil Procedure 53 to assist the Court in its remedial efforts. Order, Oct. 12, 2017, ECF No. 200. The order further stated that if the parties failed to reach an agreement as to a list of candidates, the Court would select a special master. *Id.* The parties subsequently informed the Court that they had conferred but failed to reach an agreement as to the requested list of special master candidates. Notice, Oct. 18, 2017, ECF No. 201.

On October 26, 2017, the Court informed the parties that, after carefully considering Plaintiffs' objections, it was concerned that nine district configurations in the 2017 Plans either failed to remedy the identified constitutional violations or were otherwise legally unacceptable. Order, Oct. 26, 2017, ECF No. 202. The Court further informed the parties that in light of its concerns, it intended to appoint Dr. Nathaniel Persily of Stanford University as Special Master to assist the Court by drawing alternative remedial districting plans. *Id.* The Court gave the parties an opportunity to object to the appointment of Dr. Persily. *Id.* Pursuant to the Court's invitation,

Legislative Defendants objected to the appointment of a special master and Dr. Persily, in particular, but they did not identify any alternative candidate to serve as special master. Obj., Oct. 30, 2017, ECF No. 204.

In a November 1, 2017 order, the Court overruled Legislative Defendants' objections and appointed Dr. Persily as Special Master. Order ("Appointment Order"), Nov. 1, 2017, ECF No. 206. The Appointment Order described the Court's concerns with the Subject Districts and set forth the scope of the Special Master's responsibilities. *Id.* The Appointment Order also directed the Special Master to adhere to the following guidelines in redrawing Subject Districts:

> a. Redraw district lines for [2011 Enacted Senate Districts 21 and 28 and House Districts 21, 33, 38, 57, 99, 102, and 107] and any other districts within the applicable 2017 county grouping necessary to cure the unconstitutional racial gerrymanders. As to House District 57, the redrawn lines shall also ensure that the unconstitutional racial gerrymanders in 2011 Enacted House Districts 58 and 60 are cured. As to 2011 Enacted House Districts 33, 38, 99, 102, and 107, no 2011 Enacted House Districts which do not adjoin those districts shall be redrawn unless it is necessary to do so to meet the mandatory requirements set forth in Paragraphs 2(b) through 2(e) of this Order, and if the Special Master concludes that it is necessary to adjust the lines of a non-adjoining district, the Special Master shall

include in his report an explanation as to why such adjustment is necessary.

b. Use the 2010 Federal Decennial Census Data.

c. Draw contiguous districts with a population as close as possible to 79,462 persons for the House Districts and 190,710 persons for the Senate Districts, though a variance up to +/- 5% is permitted and authorized if it would not conflict with the primary obligations to ensure that remedial districts remedy the constitutional violations and otherwise comply with state and federal law, would enhance compliance with state policy as set forth in subsection (f) below, and would not require redrawing lines for an additional district.

d. Adhere to the county groupings used by the General Assembly in the 2017 Enacted Senate and House Plans.

e. Subject to any requirements imposed by the United States Constitution or federal law, comply with North Carolina constitutional requirements including, without limitation, the Whole County Provision as interpreted by the North Carolina Supreme Court.

f. Make reasonable efforts to adhere to the following state policy objectives, so long as adherence to those policy objectives does not conflict with the primary obligations of ensuring that remedial districts remedy the constitutional violations and otherwise comply with state and federal law:

i. Split fewer precincts than the 2011 Enacted Districts;

ii. Draw districts that are more compact than the 2011 Enacted Districts, using as a guide the minimum Reock ("dispersion") and Polsby-Popper ("perimeter") scores identified by Richard Pildes & Richard Neimi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993); and

iii. Consider municipal boundaries and precinct lines.

g. After redrawing the districts, in view of the policy decision by the General Assembly that efforts to avoid pairing incumbents are in the interest of North Carolina voters, the Special Master may adjust district lines to avoid pairing any incumbents who have not publicly announced their intention not to run in 2018, but only to the extent that such adjustment of district lines does not interfere with remedying the constitutional violations and otherwise complying with federal and state law. Additionally, the Special Master shall treat preventing the pairing of incumbents as "a distinctly subordinate consideration" to the other traditional redistricting policy objectives followed by the State. *Ga. State Conf. of NAACP v. Fayette Cty. Bd. of Comm'rs*, 996 F. Supp. 2d 1353, 1363 (N.D. Ga. 2014) (collecting cases).

h. Except as authorized in Paragraph 2(g), the Special Master shall not consider incumbency or election results in drawing the districts. *See, e.g.*, *Wise v. Lipscomb*, 437 U.S. 535, 541 (1978) (noting that courts lack "political authoritativeness" and must act "in a manner free from any taint of arbitrariness or discrimination" in drawing remedial districts) (quoting *Connor v. Finch*, 431 U.S. 408, 417 (1977)); *Wyche v. Madison Par. Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts."); *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981) (noting that "a court is forbidden to take into account the purely political considerations that might be appropriate for legislative bodies"); *Favors v. Cuomo*, Docket No. 11-cv-5632, 2012 WL 928216, at *18 (E.D.N.Y. Mar. 12, 2012), *report and recommendation adopted as modified*, No. 11-cv-5632, 2012 WL 928223, at *6 (E.D.N.Y Mar. 19, 2012); *Molina v. Cty. of Orange*, No. 13CV3018, 2013 WL 3039589, at *8 (S.D.N.Y. June 3, 2013), *supplemented*, No. 13CV3018, 2013 WL 3039741 (S.D.N.Y. June 13, 2013), *report and recommendation adopted*, No. 13 CIV. 3018 ER, 2013 WL 3009716 (S.D.N.Y. June 14, 2013); *Larios v. Cox*, 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004); *Balderas v. Texas*, No. 6:01CV158,

2001 WL 36403750, at *4 (E.D. Tex. Nov. 14, 2001).

i. The Special Master may consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders and otherwise complies with federal law.

Id. The Appointment Order further directed the Special Master to submit to the Court by December 1, 2017, a report that included reconfigured districting plans for each of the Subject Districts, an explanation of those plans, and a comparison of those plans with the related districts in the 2017 Plans and districts submitted by Plaintiffs. *Id.*

Pursuant to the Court's Appointment Order, the Special Master immediately set out to draw new configurations for the Subject Districts. On November 14, 2017, the Special Master disclosed to the parties and filed with the Court draft reconfigurations of the Subject Districts as well as an explanation of his rationale behind those reconfigurations. Special Master's Corrected Draft Plan and Order, Nov. 14, 2017, ECF No. 213. In accordance with the Court's Appointment Order, the Special Master's draft plan made no effort to avoid pairing incumbents. *Id.* at 4. Rather, the Special Master ordered the parties to submit objections and proposed revisions to the draft plan, including suggestions "as to how incumbents shall be unpaired without degrading the underlying features of the [draft] plan." *Id.* at 19.

Pursuant to the Special Master's order, Plaintiffs submitted comments on the Special Master's draft

plan on November 17, 2017, stating, *inter alia*, that they believed the draft plan remedied the constitutional flaws with the subject districts. Pls.' Resp. & Proposed Modifications to the Special Master's Draft Plan, Nov. 17, 2017, ECF No. 216. Plaintiffs further suggested several approaches the Special Master could take in revising his draft plans to avoid pairing incumbents in some, but not all, of the reconfigured districts. *Id.*

By contrast, Legislative Defendants elected not to raise *any* objection to specific aspects of the Special Master's draft plan or offer suggestions as to how the Special Master could improve his draft plan or avoid pairing incumbents, representing that they lacked authority under State law to advise the Special Master on the drawing of remedial districts. Leg. Defs.' Response to Special Master's Draft Rep. ("Leg. Defs.' Draft Rep. Resp.") 5, Nov. 17, 2017, ECF No. 215 (explaining that "the legislative defendants do not themselves speak for the entire General Assembly" and therefore that "[a] few members of the legislature, even if they are leaders, are not authorized to state how the entire legislature would vote on, or amend, draft districts proposed by a law professor"). Rather than offering any substantive comments or suggestions regarding the Special Master's draft plan, Legislative Defendants elected to renew their objections to this Court's jurisdiction and the Special Master's authority to draw remedial districts. *See generally id.*

In response, Plaintiffs asserted that Legislative Defendants' jurisdictional arguments were without merit. Pls.' Resp. to Leg. Defs.' Nov. 17, 2017 Filing,

Nov. 21, 2017, ECF No. 217. The Legislative Defendants then objected to Plaintiffs' suggestions for unpairing incumbents on grounds that the suggestions served to benefit Democratic candidates, offered some criticisms, and recommended that the Special Master advise the Court to adopt the General Assembly's 2017 Plans in full, rather than his proposed remedial plans. Leg. Defs.' Resp. to Pls.' Proposed Modifications to Special Master's Draft Plan, Nov. 21, 2017, ECF No. 218.

On December 1, 2017, after receiving comments and suggestions from the parties, the Special Master filed with this Court his Recommended Plan and Report and numerous supporting materials. Special Master's Rec. Plan & Rep. ("Rec. Plan & Rep."), Dec. 1, 2017, ECF No. 220. In his 69-page report, the Special Master presented his Recommended Plans for the Subject Districts and thoroughly explained how those configurations conformed to the Court's guidelines and advanced traditional redistricting criteria; described how the Recommended Plans addressed the Court's concerns with the Subject Districts and cured the constitutional violations with the related districts in the 2011 Plans; explained why his remedial configurations were superior to those proposed by Plaintiffs; and offered alternative configurations to address several potential concerns with his Recommended Plans. *See generally id.* Notwithstanding that Legislative Defendants elected not to suggest how incumbents should be unpaired—and categorically objected to Plaintiffs' suggestions for unpairing certain incumbents—the Special Master's Recommended Plans avoids pairing all but two of the incumbents—one Republican and one Democrat—in

his reconfigured districts and did not pair *any* incumbents of the same party. *Id.* at 30, 37.

On December 8, 2017, Plaintiffs notified the Court that they had no objections to the Special Master's Recommend Plan. Pls.' Pos. on the Special Master's Recommended Plan, Nov. 8, 2017, ECF No. 223. That same day, Legislative Defendants filed with the Court numerous objections to the Special Master's Recommended Plan and Report, Leg. Defs.' Resp. to Special Master's Recommended Plan & Report ("Leg. Defs.' Rec. Plan Resp."), Nov. 8, 2017, ECF No. 224, notwithstanding that Legislative Defendants had previously represented that they lacked authority under state law to comment on or provide suggestions regarding the Special Master's reconfigurations, Leg. Defs.' Draft Rep. Resp. 5. Legislative Defendants maintained that the Recommended Plans "reveal[]the [S]pecial Master's single-minded focus on race" and that the recommended districts, if adopted by the Court, would "impose on the State a racial gerrymander that favors one political party." Leg. Defs.' Rec. Plan Resp. at 2-3. Although Legislative Defendants had offered no substantive suggestions to the Special Master regarding his earlier draft plan, Legislative Defendants raised several district-specific objections to the Recommended Plans and argued that the 2017 Plans were superior to the Recommended Plans. *Id.* at 8-17. Finally, Legislative Defendants objected to the Special Master's unpairing of Democratic incumbents, but appeared to acquiesce in the Special Master's unpairing of Republican incumbents. *Id.* at 20 ("The special master agreed to allow plaintiffs' requests and submitted a final plan that un-pairs numerous Democratic incumbents, even

where doing so required him to make changes to his draft districts in a way that did not improve the scoring of the districts under traditional redistricting principles.").

On January 5, 2017, the Court held a hearing during which the Special Master presented his Recommended Plans and addressed numerous questions raised by the parties. At the hearing, Legislative Defendants also introduced expert and testimonial evidence pertaining to alleged infirmities with the Recommended Plans. Having carefully reviewed the 2017 Plans; the Special Master's Recommended Plan and Report, and the materials appended thereto; and the parties' evidence, briefing, and oral arguments, we sustain Plaintiffs' objections to the Subject Districts and approve and adopt the Special Master's Recommended Plans for reconfiguring those districts.

II.

Before addressing the merits of Plaintiffs' objections to certain districts in the 2017 Plans, including the Subject Districts, we first must address several threshold arguments made by Legislative Defendants, which seek to circumscribe the scope of this Court's review of the General Assembly's proposed 2017 Plans. In particular, Legislative Defendants argue that: (1) the enactment of the 2017 Plans rendered this action moot; (2) this Court's review of the 2017 Plans extends, at most, to determining whether the plans corrected the racial gerrymander; (3) this Court lacks jurisdiction under the three-judge panel statute to consider *any* of Plaintiffs' objections other than the racial

gerrymandering allegations that initially served as the basis of this panel's jurisdiction; and (4) this Court may not, as a matter of federalism, consider Plaintiffs' state law objections. We address each of these arguments in turn.

A.

Legislative Defendants first contend that the General Assembly's enactment of the new districting plans rendered this case moot. Leg. Defs.' Objs. Resp. 19-21. In particular, Legislative Defendants argue that because the districting plans that served as the basis of Plaintiffs' challenge have been replaced, "[P]laintiffs no longer have a concrete stake in the outcome of the case." *Id.* at 20. This argument is without merit.

The Supreme Court long has held that when a federal court concludes that a state districting plan violates the Constitution, the appropriate state redistricting body should have the first opportunity to enact a plan remedying the constitutional violation. *Reynolds v. Sims*, 377 U.S. 585, 586 (1964). But after finding unconstitutional race-based discrimination—as this Court did here—a district court also has a "duty" to ensure that any remedy "so far as possible eliminate[s] the discriminatory effects of the past as well as bar[s] like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965); *see also, e.g.*, *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (holding invalid State's proposed remedy for state constitutional provision that violated the Fifteenth Amendment because it "part[ook] too much of the infirmity" of the original unconstitutional provision). To that end, if the state fails to enact "a

constitutionally acceptable" remedial districting plan, then "the responsibility falls on the District Court." *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *see also Reynolds*, 377 U.S. at 586 (holding that a district court "acted in a most proper and commendable manner" by imposing its own remedial districting plan, after the district court concluded that remedial plan adopted by state legislature failed to remedy constitutional violation).

In accordance with *Chapman* and *Reynolds*, the U.S. Court of Appeals for the Fourth Circuit has held that when, as here, a state enacts a redistricting plan in an effort to remedy a constitutional violation, a district court must "consider whether the proffered remedial plan is legally unacceptable because it violates anew constitutional or statutory voting rights—that is, whether it fails to meet the same standards applicable to an original challenge of a legislative plan in place." *McGhee v. Granville Cty., N.C.*, 860 F.2d 110, 115 (4th Cir. 1988). Numerous other courts have reached the same conclusion—federal courts *must* review a state's proposed remedial districting plan to ensure it completely remedies the identified constitutional violation and is not otherwise legally unacceptable. *See, e.g., Large v. Fremont Cty., Wyo.*, 670 F.3d 1133, 1138, 1148-49 (10th Cir. 2012) (rejecting governmental entity's proposed districting plan to remedy Voting Rights Act violation because it failed to comply with state law); *Ketchum v. Byrne*, 740 F.2d 1398, 1411-12 (7th Cir. 1984) (rejecting governmental entity's proposed remedial districting plan because it failed to completely remedy Voting Rights Act violation); *Williams v. City of Texarkana, Ark.*, 32 F.3d 1265, 1268 (8th Cir. 1994) ("If an

appropriate legislative body offers a remedial plan, the court must defer to the proposed plan *unless the plan does not completely remedy the violation or the proposed plan itself constitutes a ... violation* [of the Voting Rights Act]." (emphasis added)); *Harris v. McCrory*, No. 1:13-cv-949, 2016 WL 3129213, at *2 (M.D.N.C. June 2, 2016) (holding, in racial gerrymandering case, that a district court "must determine whether the legislative remedy enacted at its behest is in fact a lawful substitute for the original unconstitutional plan"); *United States v. Osceola Cty., Fla.*, 474 F. Supp. 2d 1254, 1258 (M.D. Fla. 2006) (rejecting governmental body's remedial districting plan because it was "not a full and adequate remedy" of the identified Voting Rights Act violation).

Additionally, we emphasize that the General Assembly redrew the Subject Districts pursuant to the opportunity provided by this Court's order to "enact new House and Senate districting plans remedying the constitutional deficiencies." *Covington III*, 2017 WL 3254098, at *3. It is axiomatic that this Court has the inherent authority to enforce its own orders. *See, e.g., Carlisle v. United States*, 517 U.S. 416, 438 (1996) (noting that "[e]xamples of the exercise of the federal courts' inherent powers are abundant in both our civil and our criminal jurisprudence" and collecting cases); *see also Degen v. United States*, 517 U.S. 820, 827 (1996); *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 122 (4th Cir. 1983). This is especially so here, given that the state constitution prohibited the General Assembly from engaging in mid-decade redistricting absent this Court's order. Thus, this Court has a strong interest in ensuring that the legislature

complied with, but did not exceed, the authority conferred by this Court's order.

Legislative Defendants do not cite any persuasive authority supporting their position that the enactment of the proposed remedial plans rendered this action moot. Nor do Legislative Defendants acknowledge, much less try to distinguish, the voluminous authority contrary to their unsupported position. Accordingly, the General Assembly's enactment of its remedial plans did not moot this action.

B.

Second, Legislative Defendants argue that even if the case is not moot, our review of the proposed remedial districts is limited to determining, at most, whether the General Assembly corrected the racial gerrymanders previously identified by this Court. According to Legislative Defendants, this Court, therefore, may not consider whether the remedial plans otherwise violate federal or state constitutional or statutory law. Leg. Defs.' Objs. Resp. 22-28, 51-52.

In support of their argument that this Court may consider only those challenges to a remedial districting plan that rely on the same legal theory as the original violation, Legislative Defendants principally rely on the Supreme Court's statement in *Upham v. Seamon*, 456 U.S. 37 (1982), that a court-drawn interim remedial plan may not "'reject[]state policy choices more than ... necessary to meet the *specific constitutional violations*.'" Leg. Defs.' Obj. Resp. 23 (quoting *Upham*, 456 U.S. at 42 (emphasis retained)). According to Legislative Defendants, the Supreme Court's use of the phrase "specific

constitutional violations" limits this Court's review to determining whether the remedial plans corrected the racial gerrymanders identified by this Court.

But in *Upham*, the Supreme Court struck down a court-drawn *interim* remedial plan because the district court redrew an *entire* state districting plan, notwithstanding that only two of twenty-seven districts were the subject of an *ongoing* challenge by the Attorney General. 456 U.S. at 43 ("We have never said that the entry of an objection by the Attorney General to any part of a state plan grants a district court the authority to disregard aspects of the legislative plan not objected to by the Attorney General."). Unlike in *Upham*, this Court and the Supreme Court have rendered final decisions that the General Assembly's 2011 districting plans violated the Constitution. Also unlike in *Upham*, this Court has given the legislature the first opportunity to draw new districts. And most significantly, unlike the district court in *Upham*, which redrew districts unaffected by the alleged violation, this Court did not—indeed, could not—direct the General Assembly to redraw districts unaffected by the constitutional violation. *Upham*, therefore, does not constrain this Court's authority to ensure that the General Assembly's proposed remedial plan complies with federal and state law.

Legislative Defendants similarly misplace reliance on the Fourth Circuit's decision in *McGhee*. There, a district court found that a municipal districting plan that elected all five county commissioners in county-wide, at-large districts violated Section 2 of the Voting Rights Act by freezing a sizable minority of African-American citizens

(approximately 40 percent of the voting age population) out of any representation on the commission. *McGhee*, 860 F.2d at 112-13. To remedy the violation, the county adopted a new plan composed of seven single-member districts. *Id.* at 113. Only two of the seven remedial districts were majority-minority, meaning that, according to the plaintiffs, the preferred candidates of African-Americans would make up, at most, 28 percent of the commission, less than their proportional representation in the county. *Id.* at 113-14. In order to provide African-American representation on the commission in proportion to the population of African-Americans in the county, the district court rejected the proposed plan and adopted an alternative plan akin to cumulative voting. *Id.* at 114.

The Fourth Circuit concluded the district court erred in rejecting the county's proposed plan and adopting the cumulative voting plan. *Id.* The Court emphasized that the plain language of the Voting Rights Act stated that minority groups have no right to "proportional representation." *Id.* at 119. Because (1) the county's plan provided a "complete remedy" for the Section 2 violation and (2) the proportional representation plan adopted by the court exceeded the relief to which the plaintiffs were entitled under the Voting Rights Act, the district court erred. *Id.* at 115, 120-21 (internal quotation marks omitted). Unlike the *McGhee* plaintiffs' request for proportional representation, Plaintiffs do not ask this Court to provide relief exceeding that to which they are entitled under the Constitution or law, nor is this Court ordering any such relief. Rather, Plaintiffs simply ask this Court not to approve a proposed remedy for the

racial gerrymandering that "violates anew constitutional or statutory voting rights"—a proposition *McGhee* expressly supports. *Id.* at 115.

Contrary to Legislative Defendants' argument that *Upham* and *McGhee* foreclose review of violations other than those originally alleged, numerous courts, including three-judge panels in this circuit bound by *Upham*, have held that their review of a remedial redistricting plan extends beyond the particular legal theory that was the basis for invalidating the original plan. *Large*, 670 F.3d at 1148 (rejecting municipal redistricting plan imposed to remedy Voting Rights Act violation due to noncompliance with state constitutional provision); *Harris*, 2016 WL 3129213, at *2 (rejecting Legislative Defendants' argument that the court's review of remedial maps was "limited to whether the new Congressional Districts 1 and 12 pass constitutional muster," and stating that "precedent suggests that we have a responsibility to review the plan as a whole" (citing *McGhee*, 860 F.2d at 115)); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 564 (E.D. Va. 2016) ("[T]hough the [legislator intervenors] urge us not to consider the requirements of Section 2, as no Section 2 claim was raised in *Page II*, we think it appropriate to implement a plan that complies with federal policy disfavoring discrimination against minority voters." (footnote omitted)); *Jeffers v. Clinton*, 756 F. Supp. 1195, 1199 (E.D. Ark. 1990) (rejecting districts created by remedial plan that failed to comply with Voting Rights Act, notwithstanding that such districts were not subject to original challenge); *Sullivan v. Crowell*, 444 F. Supp. 606, 611-12 (W.D. Tenn. 1978) (finding that legislative remedial plan enacted to cure one-person,

one-vote violations violated state constitution); *cf. Burns v. Richardson*, 384 U.S. 73, 83 (1966) (holding that court considering remedial apportionment plan "must consider the scheme as a whole"). Again, Legislative Defendants fail to acknowledge, much less distinguish, this contrary authority.

Additionally, were this Court to accept Legislative Defendants' argument, the General Assembly could draw a map to remedy their racial gerrymander that plainly violated, for example, the Equal Protection Clause's one-person, one-vote requirement. According to Legislative Defendants, this Court nonetheless would be required to approve the map, and wait for Plaintiffs to bring a separate one-person, one-vote claim. Plaintiffs then would be forced to incur the costs of litigating a new action, and the majority party in the legislature would reap the benefits of using an unconstitutional districting plan for another election cycle. Indeed, a legislature could adopt seriatim unconstitutional or unlawful districting plans as remedial plans so long as each new plan violated a different constitutional or statutory provision. To be sure, some challenges to a remedial districting plan—like Plaintiffs' partisan gerrymandering objection—would demand development of significant new evidence and therefore be more appropriately addressed in a separate proceeding. But in the absence of a demonstration that objections to a remedial districting plan require such factual development, this Court declines to create the perverse incentive Legislative Defendants propose.

C.

Third, Legislative Defendants assert that, as a general matter, this Court lacks jurisdiction under the three-judge panel statute, 28 U.S.C. § 2284, to consider *any* objections other than racial gerrymandering, including objections premised on violations of state law. Leg. Defs.' Objs. Resp. 26. Legislative Defendants are correct that Section 2284 establishes the jurisdiction for a three-judge panel to hear federal constitutional challenges relating to the apportionment of any statewide legislative body. *See Kalson v. Paterson*, 542 F.3d 281, 287 (2d Cir. 2008) (holding the three-judge requirement under Section 2284 is jurisdictional). But "once convened, 'the jurisdiction of the [three-judge] District Court so constituted ... extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decisions of such of the questions as in its opinion effectively dispose of the case.'" *Armour v. Ohio*, 775 F. Supp. 1044, 1048 (N.D. Ohio 1991) (quoting *Sterling v. Constantin*, 287 U.S. 378, 393- 94 (1932)); *see also Page v. Bartels*, 248 F.3d 175, 190 (3d Cir. 2001), *as amended* (June 25, 2001) (holding that the pendent jurisdiction of a three-judge panel extends to all claims that are "inextricably intertwined" with the claim that served as the basis of the panel's jurisdiction). To that end, a number of three-judge panels have exercised their pendent jurisdiction over state law claims in redistricting cases, particularly when state law claims are "inextricably intertwined" with their federal constitutional claims. *See, e.g., Page*, 248 F.3d at 190; *Armour*, 775 F. Supp. at 1048; *Sullivan*, 444 F. Supp. at 613 (noting that "pendent jurisdiction of a properly

convened three-judge court is measured by the same standards applicable to a one-judge district court" and therefore exercising pendent jurisdiction over claim that multimember remedial districts violated state constitution).

Legislative Defendants identify two decisions in which three-judge district courts have declined to exercise their pendent jurisdiction over state law claims or non-redistricting federal claims. But in those cases the courts did not dispute their authority to exercise pendent jurisdiction over related state or federal claims; rather, they declined to exercise such jurisdiction because the state law claims or non-redistricting federal claims were unrelated to the claim giving rise to the panel's jurisdiction. *See, e.g.*, *Robertson v. Bartels*, 148 F. Supp. 2d 443, 461-62 (D.N.J. 2001) (declining to exercise pendent jurisdiction in racial gerrymandering case over claim that durational residency requirement violated state constitution); *Adams v. Clinton*, 90 F. Supp. 2d 35, 39 (D.D.C. 2000) (declining to exercise pendent jurisdiction in case challenging denial of apportionment of representative to District of Columbia to various other claims premised on denial of home rule). Accordingly, this Court has authority under Section 2284 to consider Plaintiffs' federal and state law objections to the General Assembly's remedial plan, at least to the extent such objections are "inextricably intertwined" with the claim that serves as the basis of this Court's jurisdiction.

There are no doubt cases when it is appropriate for a three-judge panel to decline to exercise jurisdiction over an allegedly pendent claim, such as

when the claim implicates an unsettled question of state law. *See Robertson*, 148 F. Supp. 2d at 461-62; *Hagans v. Lavine*, 415 U.S. 528, 545 (1974) (noting that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties" (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966)). Indeed, we reach that conclusion with regard to Plaintiffs' arguments that two configurations in the 2017 Plan fail to comply with the North Carolina Constitution's Whole County Provision. *See infra* Part III.B.2.

But having considered the factors of judicial economy, convenience, fairness to the litigants, and comity, the Court finds that the exercise of pendent jurisdiction over Plaintiffs' objections premised on Legislative Defendants' alleged failure to comply with the North Carolina Constitution's prohibition on mid-decade redistricting is particularly appropriate here. *See Sullivan*, 444 F. Supp. at 613. Indeed, declining to exercise such jurisdiction would cause significant problems. As further explained below, this Court's order invalidating the lines surrounding the twenty-eight districts provided the sole authority for the General Assembly to ignore the North Carolina Constitution's prohibition on mid-decade redistricting. *See infra* Part III.B.1. Because this Court's order governed the scope of the General Assembly's redistricting authority, this Court is in the best position to determine whether the General Assembly exceeded its authority under that order by redrawing districts allegedly untainted by the identified constitutional violation.

D.

Finally, Legislative Defendants assert that, as a matter of federalism, this Court is barred from considering whether the proposed remedial plans comply with state law. But Legislative Defendants cite no cases holding that, having found that a districting plan violates the Constitution or federal law, a federal court may not consider whether a remedial plan violates state law. On the contrary, several courts have rejected remedial plans as violative of a state constitution or statute. *Large*, 670 F.3d at 1146 ("When a political subdivision of a State substantively contravenes the laws of that State—at least insofar as that contravention is not sanctioned by higher federal law—it no longer acts as an agent of that sovereign, and therefore is due no federal-court deference."); *Sullivan*, 444 F. Supp. at 611-12 (finding that legislative remedial plan enacted to cure one-person, one-vote violations violated state constitution). Legislative Defendants make no effort to address, much less distinguish, these cases.

More significantly, as Legislative Defendants concede, in apportionment cases, federal courts tasked with drawing or reviewing remedial maps should not "displac[e] legitimate state policy judgments with the court's own preferences." *Perry v. Perez*, 565 U.S. 388, 394 (2012). Here, North Carolina citizens have enshrined in their constitution a "policy judgment[]" that the General Assembly should not engage in mid-decade redistricting or disregard county lines unless compelled to do so by federal law. It would be paradoxical to hold, as Legislative Defendants argue, that this Court must defer to the legislature's policy

decisions regarding redistricting, but not to the people of North Carolina's sovereign decisions in their constitution regarding the policies the legislature must follow in engaging in such redistricting.

* * * * *

In sum, we reject Legislative Defendants' efforts to circumscribe this Court's review of the remedial plans. Accordingly, in determining whether each of the General Assembly's remedial plans completely remedies the constitutional violation, we must also assess whether the "proffered remedial plan is legally unacceptable because [they] violate[] anew constitutional or statutory voting rights" under federal or state law. *McGhee*, 860 F.2d at 115.

III.

Having disposed of Legislative Defendants' arguments pertaining to the scope of our review, we now turn to Plaintiffs' specific objections to aspects of the 2017 Plans. In particular, Plaintiffs assert (1) that four of the districts—proposed remedial Senate Districts 21 and 28 and House Districts 21 and 57—fail to remedy the racial gerrymander that served as the basis for invalidating the 2011 version of those districts and (2) that several of the districts and district configurations violate provisions in the North Carolina Constitution.[2] We address each objection in turn.

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[2] Plaintiffs' also assert that the 2017 Plans, when analyzed as a whole, amounted to "grossly unconstitutional partisan gerrymanders" in violation of the Equal Protection Clause. Pls.' Objs. 42-43. Plaintiffs, however, acknowledge that in the absence of discovery, this Court does not have an adequate record to rule on their partisan gerrymandering objection. *Id.* Accordingly,

A.

As detailed more fully in this Court's earlier opinion, a state legislature engages in impermissible racial gerrymandering, if, in drawing the district lines, consideration of "race predominated over traditional race-neutral redistricting principles," absent a showing by the State that the "'districting legislation [wa]s narrowly tailored to achieve ... [a] compelling state interest.'" *Covington I*, 316 F.R.D. at 129 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)). Predominance may be shown "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* (quoting *Alabama*, 135 S. Ct. at 1267). "In general, that requires proof that 'the legislature subordinated traditional race-neutral districting principles, including ... compactness, contiguity, and respect for political subdivisions ... to racial considerations." *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 907 (1995)). Relevant circumstantial evidence that the Supreme Court has considered in determining whether racial considerations predominated includes, but is not limited to: "bizarre or non-compact district shape" and "district lines that cut through traditional geographic boundaries or local election precincts." *Id.*

Plaintiffs do not presently raise any partisan gerrymandering objection, and therefore we do not address whether the 2017 Plans are unconstitutional partisan gerrymanders.

In finding that race predominated in the drawing of dozens of district lines in the 2011 districting plans—including the previous versions of the four districts subject to Plaintiffs' racial gerrymandering objections—this Court relied on both direct and circumstantial evidence. In particular, Representative Lewis's and Senator Rucho's instructions that Dr. Hofeller draw, where possible, majority-African American "VRA districts"—which Dr. Hofeller implemented by searching for minority population centers and, where feasible, drawing district lines around those population centers—provided direct evidence that the General Assembly predominantly relied on race in drawing the challenged districts. *Id.* at 130-37. We also relied on circumstantial evidence of the General Assembly's subordination of traditional race-neutral principles, such as the challenged districts' bizarre shapes, lack of compactness, and division of counties, municipalities, precincts, and communities of interest along racial lines. *See, e.g., id.* at 137-38, 143-51. With this evidence as a backdrop, we now must consider whether each of the four districts "so far as possible eliminate[s] the discriminatory effects" of the racial gerrymander in each of the four districts.[3] *Louisiana*, 380 U.S. at 154.

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[3] Plaintiffs and Legislative Defendants disagree as to the governing burden of proof. According to Plaintiffs, Defendants bear the burden of establishing the 2017 districts completely remedy the constitutional violation. By contrast, Legislative Defendants assert that Plaintiffs bear the burden of proving that the 2017 districts fail to remedy the constitutional violation. Plaintiffs are correct that, outside the context of redistricting, the Supreme Court has held that once a governmental action is found to violate the Equal Protection Clause, the governmental

In doing so, we also must keep in mind that we are not confronted with an original racial gerrymandering challenge to the four proposed remedial districts. Rather, we consider these districts after already having found that their preceding versions violated the Constitution. This remedial posture impacts the nature of our review. Generally, state legislative enactments—including districting plans—are presumed valid and entitled to substantial judicial deference. *See Upham*, 456 U.S. at 43 ("[I]n the absence of a finding that the ... reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free ... to disregard the political program of the ... State Legislature."); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution."). "The district

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defendant bears the burden of demonstrating that its proposed remedial plan remedies the constitutional violation. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 547-48 (1996) (holding, in sex discrimination case, that "[h]aving violated the Constitution's equal protection requirement, Virginia was obliged to show that its remedial proposal 'directly address[ed] and relate[d] to' the violation" (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)); *Greene v. Cty. School Bd. of New Kent Cty., Va.*, 391 U.S. 430, 439 (1968) ("The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now."). But the Supreme Court never has addressed where the burden lies in the context of a challenge to a state redistricting plan adopted to remedy a racial gerrymander. We need not decide that unsettled question, however, because we conclude that regardless of whether the burden lies with Defendants or Plaintiffs, Senate Districts 21 and 28 and House Districts 28 and 57 fail to remedy the constitutional violation.

court need not defer to a state-proposed *remedial plan*, however, if the plan does not *completely remedy* the violation ...." *Harvell v. Blythe Sch. Dist. No. 5*, 126 F.3d 1038, 1040 (8th Cir. 1997) (emphases added); *cf. Abrams v. Johnson*, 521 U.S. 74, 85 (1997) (holding that legislative "plan is not owed *Upham* deference to the extent the plan subordinated traditional districting principles to racial considerations"). Accordingly, when, as here, "the districting plan is offered as a replacement for one invalidated by the court[,] ... the court has an independent duty to assess its constitutionality, and cannot ignore substantial evidence of improper racial motivation." *Wilson v. Jones*, 130 F. Supp. 2d 1315, 1322 (S.D. Ala. 2000), *aff'd sub nom.*, *Wilson v. Minor*, 220 F.3d 1297 (11th Cir. 2000).

In the remedial posture, courts must ensure that a proposed remedial districting plan completely corrects—rather than perpetuates—the defects that rendered the original districts unconstitutional or unlawful. *See Abrams*, 521 U.S. at 86. To that end, a remedial districting plan cannot be based on considerations that "would validate the very maneuvers that were a major cause of the unconstitutional districting." *Id.*

Of particular relevance here, *see infra* Parts III.A.1-4, efforts to protect incumbents by seeking to preserve the "cores" of unconstitutional districts or through reliance on political data closely correlated with race—particularly attempts to ensure an incumbent will prevail in his or her new district—have the potential to embed, rather than remedy, the effects of an unconstitutional racial gerrymander in a

proposed remedial districting plan. Although the Supreme Court has not squarely addressed whether, and by what means, a state redistricting body tasked with drawing remedial districts may protect incumbents elected in racially gerrymandered districts, four Justices have stated that whether "the goal of protecting incumbents is legitimate, even where, as here, individuals are incumbents by virtue of their election in an unconstitutional racially gerrymandered district .... is a questionable proposition." *Easley v. Cromartie*, 532 U.S. 234, 262 n.3 (2001) (Thomas, J., dissenting) (noting that that question was not presented to the Supreme Court or district court and, therefore, that the Court had not addressed it). Lower courts likewise have expressed concern that remedial districts drawn to protect incumbents elected under an unlawful or unconstitutional plan may serve to perpetuate the identified violation. *See, e.g.*, *Ketchum*, 740 F.2d at 1408 (expressing skepticism about efforts to protect incumbents in maps drawn to remedy impermissible race-based districting because "many devices employed to preserve incumbencies are necessarily racially discriminatory"); *Jeffers*, 756 F. Supp. at 1199-1200 (rejecting remedial districts that violated the Voting Rights Act, notwithstanding that governmental defendant asserted the districts were drawn to protect incumbents, because "[t]he desire to protect incumbents, either from running against each other or from a difficult race against a black challenger, cannot prevail if the result is to perpetuate the violations of the equal-opportunity principle contained in the Voting Rights Act").

The potential for efforts to protect incumbents to perpetuate a constitutional violation is greater with some forms of incumbency protection than others. Outside of the remedial context, the Supreme Court has recognized that in drawing district lines a legislature may seek to "avoid[]" pairing incumbents in the same district. *See Karcher v. Daggett*, 462 U.S. 725, 740-41 (1983). But the Supreme Court has emphasized that, even when a legislature is not seeking to remedy an unconstitutional districting plan, other forms of incumbency protection—most notably, efforts to ensure an incumbent will prevail in his new district—pose greater concerns, particularly when efforts to protect incumbents rely on considerations closely correlated with race.

In *League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399 (2006), the Supreme Court considered a mid-decade redistricting plan that removed Latinos from a district in order to protect an incumbent "from a constituency that was increasingly voting against him." *Id.* at 440-41. Notwithstanding that the district court concluded that the legislature removed the Latino voters from the district "for political, not racial, reasons," the Supreme Court found the districting plan violated Section 2 of the Voting Rights Act. *Id.* In reaching this conclusion, the Court stated that "incumbency protection can be a legitimate factor in districting, but experience teaches that incumbency protection can take various forms, not all of them in the interests of the constituents." *Id.* at 440-41 (citation omitted).

> If the justification for incumbency protection is to keep the constituency intact so the

> officeholder is accountable for promises made or broken, then the protection seems to accord with the concern for the voters. If, on the other hand, incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters. By purposely redrawing lines around those who opposed [the incumbent], the state legislature took the latter course. This policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters.

Id. Lower courts have reached the same conclusion—drawing districts "on a block-by-block or neighborhood- or town-splitting level to corral voters perceived as sympathetic to incumbents or to exclude opponents of the incumbents" is a "form of incumbent protection [that] is much different" than the form of incumbent protection that the Supreme Court has sanctioned: avoiding the pairing of incumbents. *Vera v. Richards*, 861 F. Supp. 1304, 1336 (S.D. Tex. 1994), *aff'd sub nom.*, *Bush v. Vera*, 517 U.S. 952 (1996) (finding unconstitutional decennial redistricting plan that shifted voters among districts based on race in order to protect incumbents). Therefore, "[i]ncumbent protection is a valid state interest only to the extent that it is not a pretext for unconstitutional racial gerrymandering." *Id.*

Accordingly, regardless of whether it is ever legitimate for a state redistricting body to draw a remedial districting plan to protect incumbents elected to racially gerrymandered districts—a

question the Supreme Court has yet to squarely address—a redistricting body's desire to protect such incumbents must give way to its duty to completely remedy the constitutional violation. That is particularly true where, as here, a state redistricting body relies on redistricting criteria closely correlated with race in its pursuit of the far more suspect goal of seeking to ensure that incumbents elected in a racially gerrymandered district prevail in their remedial district.

For example, although state redistricting bodies may use political data for certain purposes when initially drawing district lines, *see Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973) (holding that state legislature did not violate Equal Protection Clause by relying on political data "to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties"), the consideration of political data to ensure incumbents will prevail in their remedial district may serve to carry forward the discriminatory effect of the original violation, *see Jeffers*, 756 F. Supp. at 1199-1200; *c.f. Personhuballah*, 155 F. Supp. 3d at 564 ("[A]t some point political concerns must give way when there is a constitutional violation that needs to be remedied."). And whereas a state redistricting body may have a "legitimate" interest in "preserving the cores of prior districts" so as to ensure an incumbent prevails in his new district when initially drawing a redistricting plan, *Karcher*, 462 U.S. at 740, Legislative Defendants concede that a remedial plan drawn to preserve the "core of [a] racially gerrymandered district" "would perpetuate [the] racial gerrymander," Leg. Defs.' Objs.

Resp. 52; *Easley*, 532 U.S. at 265 n.7 (Thomas, J., dissenting) ("Of course, considering that District 12 has never been constitutionally drawn, Dr. Weber's criticism—that the problem with the district lies not just at its edges, but at its core—is not without force."); *cf. Personhuballah*, 155 F. Supp. 3d at 561 n.8 ("[M]aintaining district cores is the type of political consideration that must give way to the need to remedy a [racial gerrymandering] violation.").[4]

In light of the remedial context—and in view of the compelling evidence presented by Plaintiffs that the General Assembly's efforts to protect incumbents by preserving district cores and through use of political data perpetuated the unconstitutional effects of the four districts that are the subject of Plaintiffs' racial gerrymandering objections, *see infra* Part III.A.1-4—we reject Legislative Defendants' two principal arguments in response to Plaintiffs' racial gerrymandering objections: (1) that the adopted criterion barring the use of racial data in drawing the 2017 Plan categorically precludes a finding that any of the districts in the plans continues to be a racial gerrymander and (2) that sustaining Plaintiffs' racial gerrymandering objections would be tantamount to holding that a state redistricting body must consider race in drawing a redistricting plan to remedy a racial gerrymander. Leg. Defs.' Objs. Resp. 30 (citing

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[4] The Court emphasizes that its holding regarding the propriety of the use of political data and core preservation to protect incumbents is limited to the remedial phase and should not be construed to address the legislature's ability to consider such factors outside the remedial context.

Adopted Criteria for House and Senate Plans, Sept. 7, 2017, ECF No. 184-37); Leg. Defs.' Rec. Plan Resp. 16.

As to the first argument—that the race-blind criterion immunizes the proposed remedial districts from any claim of racial gerrymandering—the Supreme Court long has recognized that a statute enacted by a state legislature to remedy an unconstitutional race-based election law can perpetuate the effects of the constitutional violation, and thereby fail to constitute a legally acceptable remedy, even when the remedial law is facially race-neutral. For example, in *Lane v. Wilson*, the Court considered a statute enacted by the Oklahoma legislature to remedy a racially discriminatory voter qualification provision in the Oklahoma Constitution that the Court previously had held violated the Fifteenth Amendment. 307 U.S. at 269-71; *see also Guinn v. United States*, 238 U.S. 347, 367 (1915) (striking down Oklahoma constitutional provision excluding lineal descendants of persons entitled to vote prior to January 1, 1866, from being subject to literacy test as a precondition to voting on grounds that provision "by necessary result re-creates and perpetuates the very conditions which the [Fifteenth] Amendment was intended to destroy"). Notwithstanding that the remedial statute was facially race-neutral, the Court nonetheless struck down the remedial statute as perpetuating the constitutional violation because it "part[ook] too much of the infirmity [of the violative state constitutional provision] to be able to survive." *Lane*, 307 U.S. at 275; *see also Kirksey v. Bd. of Sup'rs of Hinds Cty., Miss.*, 554 F.2d 139, 146-47 (5th Cir. 1977) ("Where a [redistricting] plan, though itself racially neutral,

carries forward intentional and purposeful discriminatory denial of access that is already in effect, it is not constitutional. Its benign nature cannot insulate the redistricting government entity from the existent taint."), *superseded by statute on other grounds as recognized in League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993).

Like the remedial election law at issue in *Lane*, even though the General Assembly here forbid the mapdrawers from considering race, the district configurations that are the subject of Plaintiffs' racial gerrymandering objections "partake too much of the infirmity" of their racially gerrymandered versions and therefore continue to constitute racial gerrymanders. *Id.* In particular, as explained more fully below, even though the Adopted Criteria barred Representative Lewis, Senator Hise, and Dr. Hofeller from considering race in drawing the remedial plans, several of the challenged districting configurations in the remedial plan preserve the "core of the racially gerrymandered district" configurations—which derived from Dr. Hofeller's 2011 VRA exemplars—thereby "perpetuat[ing] [the] racial gerrymander." Leg. Defs.' Objs. Resp. 52; *see also infra* Part III.A.1-4. Likewise, even though the mapdrawers could not consider race in drawing the 2017 Plan, the mapdrawers' use of partisan election results—which, Legislative Defendants concede, are correlated with race, Hr'g Tr. 115:8-15—to try to ensure incumbents would prevail in their remedial districts carried forward the effects of the identified racial gerrymanders, *see infra* Part III.A.1-4.

The fallacy of Legislative Defendants' argument that the race-blind criterion precludes any finding of racial gerrymandering is most evident when one follows the argument to its logical conclusion. Under Legislative Defendants' argument, a state redistricting body tasked with redrawing districts to remedy a racial gerrymander could adopt the *exact same districts* as those held unconstitutional so long as the redistricting body relied on only the prior district lines, not race, in drawing the purportedly remedial districts. Such a result plainly would not "so far as possible eliminate the discriminatory effects" of the racial gerrymander, as the Constitution demands. *Louisiana*, 380 U.S. at 154; *see also Perez v. Abbott*, — F. Supp. 3d —, 2017 WL 3495922, at *43 (W.D. Tex. Aug. 15, 2017) (rejecting State's argument that "a Legislature could ... insulate itself from a *Shaw*-type challenge simply by re-enacting its plan and claiming that it made no decisions about who to include in the district at the time of re-enactment"). Nor would this result comply with this Court's order that the General Assembly "enact new House and Senate districting plans remedying the constitutional deficiencies." *Covington III*, 2017 WL 3254098, at *3.

As to Legislative Defendants' contention that sustaining Plaintiffs' racial gerrymandering objections is tantamount to requiring that a state redistricting body consider race in redrawing districts to remedy a racial gerrymander, again we disagree. We do not hold that a legislative body tasked with redrawing districts to remedy a racial gerrymander must consider race. Rather, we hold that when, as here, a legislative body faced with such a task *chooses* to rely on redistricting considerations that have the

potential to carry forward the effects of the constitutional violation—like preserving district cores and relying on political data to draw districts that ensure incumbents will prevail in their new districts—then the legislative body must ensure that its reliance on those considerations did not serve to perpetuate the effects of the racial gerrymander. Accordingly, the General Assembly's obligation to be conscious of the prior racially drawn districts to ensure that the proposed 2017 Plans remedy the racially gerrymander derives *not* from judicial mandate, but instead from the General Assembly's *choice* to adopt redistricting criteria that posed a risk of carrying forward the effects of the racial gerrymanders in the 2011 Plans.

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In sum, we conclude that this Court has an independent duty to assess whether the remedial plans "completely remedy" the constitutional violation. And we further conclude that in the remedial context, a state redistricting body may not rely on an otherwise legitimate redistricting consideration—such as seeking to ensure incumbents will prevail in their remedial districts—if doing so would prevent it from completely remedying the identified constitutional violation. With these principles in mind, we now analyze the four proposed remedial districts subject to Plaintiffs' racial gerrymandering objections.

1. Senate District 21

The General Assembly's proposed remedial version of Senate District 21 encompasses all of Hoke County and a portion of Cumberland County. Under the plan in effect in 2010 (the "benchmark plan"),

Senate District 21 "was a 'squarely shaped' district located in the northwestern quadrant of Cumberland County." *Covington I*, 316 F.R.D. at 146. The version of Senate District 21 adopted in the 2011 plan was drawn, using Dr. Hofeller's VRA "exemplar," as a 50%-plus-one BVAP district and contained "multiple appendages, which [we]re so thin and oddly shaped that it [wa]s hard to see where the district beg[a]n and end[ed]." *Id.* This Court concluded that the district constituted a racial gerrymander because Dr. Hofeller drew the district's lines to comply with the Chairs' unconstitutional 50%-plus-one criterion and because the district was noncompact, "divide[d] traditional political boundaries on the basis of race," and divided 33 of the 41 precincts in Cumberland County. *Id.* at 147. We further concluded that compliance with the Voting Rights Act did not provide the General Assembly with the compelling interest necessary to justify its reliance on race, as the State presented no evidence that "racial bloc voting ... would enable the majority usually to defeat the minority group's candidate of choice." *Id.* at 167.

The proposed remedial version of Senate District 21 reduced the district's BVAP from 51.53 percent to 47.51 percent. Add. Stats. on 2017 Sen. Redistricting Plan, Sept. 7, 2017, ECF No. 184-6. However, the remedial version's BVAP still exceeds the BVAP of the benchmark version (44.93%). *Covington I*, 316 F.R.D. at 146. Although the remedial version of the district no longer includes some of the former version's Cumberland County appendages and splits fewer precincts, the remedial version retains the core shape of the unconstitutional version of the district. In particular, the district still encompasses all of Hoke

County and reaches into Cumberland County to include a horseshoe-shaped section of the city of Fayetteville. A comparison between Dr. Hofeller's Cumberland County exemplar and proposed remedial Senate District 21 supports the conclusion that the General Assembly's use of political data—which Legislative Defendants concede is closely correlated with race, Hr'g Tr. 115:8-15—to ensure the incumbents in Senate Districts 19 and 21 would prevail in their remedial districts served to perpetuate the unconstitutional design of the invalidated 2011 map. Most notably, the exemplar district for Senate District 21 contained a similar horseshoe-shaped section of the city of Fayetteville that includes Fayetteville's predominantly black VTDs and blocks and excludes Fayetteville's predominantly white VTDs and blocks. Tr. Ex. 3019-76. Although more compact than the previous version, the remedial district still performs poorly on statistical measures of compactness relative to other Senate districts. Senate District Compactness, Sept. 15, 2017, ECF No. 187-9.

Racial density maps prepared by Plaintiffs' expert Anthony Fairfax, which indicate the percentage of population in each census block that identified as any part black, reveal that, like the unconstitutional version of the district, the General Assembly's remedial version of the district "cuts through downtown Fayetteville and only includes the majority black VTDs as well as practically all of the majority black blocks." Decl. of Anthony E. Fairfax ("Fairfax Decl.") 4, apps. 2-5, Sept. 15, 2017, ECF No. 187-6; *see also Covington I*, 316 F.R.D. at 141. Large swaths of the majority-white sections of Fayetteville are drawn out of the district. Fairfax Decl. 4, apps. 2-5, Sept. 15,

2017, ECF No. 187-6. Legislative Defendants maintain that remedial Senate District 21's division of Fayetteville on racial lines reflects a legitimate effort to "preserve[] the heart of Fayetteville." Leg. Defs.' Objs. Resp. 37. But when confronted with the racial density maps, Legislative Defendants fail to provide any explanation or evidence as to why "preserv[ing] the heart of Fayetteville" required the exclusion of numerous majority-white precincts in downtown Fayetteville from the remedial district.

In addition to highlighting the similarities between the shape of the remedial district and the unconstitutional version, the lack of compactness, and the racial make-up of the district, Plaintiffs also submitted an analysis by an applied mathematics expert, Dr. Gregory Herschlag of Duke University, who used a computer to generate 78,485 hypothetical district maps for the Hoke/Cumberland County grouping. The computer drew the hypothetical district maps to conform to equal population requirements, maintain contiguity, preserve precincts, and, once those criteria are satisfied, maximize compactness according to the Polsby-Popper metric relied on by the General Assembly. Decl. of Dr. Gregory Herschlag ¶ 10, Sept. 14, 2017, ECF No. 187-10. Dr. Herschlag's analysis found that Senate District 21 "contain[ed] a significantly higher percentage in population that is African-American (46.5%) than *any* district in the 78,485 simulated districting plans." *Id.* at ¶ 8 (emphasis added). Legislative Defendants correctly note that the analysis has certain limitations—it relied on only one of the two principal measures of compactness embraced by the Joint Committee and did not account for one traditional districting criterion

adopted by the Joint Committee, keeping municipalities whole.[5] Nonetheless, Dr. Herschlag's analysis does provide additional evidence that the remedial version of the district perpetuates the race-based districting that rendered the earlier version unconstitutional, particularly in light of Legislative Defendants' failure to introduce any evidence explaining or justifying the remedial district's racial make-up.

In conclusion, the district (1) preserves the core shape of the unconstitutional version of the district and Dr. Hofeller's VRA exemplar, (2) has a higher BVAP than its benchmark version, (3) divides the city of Fayetteville along racial lines, (4) has a low compactness score and is significantly less compact than the benchmark version, and (5) has a far greater percentage of African Americans than thousands of other districting plans that satisfy most traditional districting principles adopted by the Joint Committee. Based on this evidence, we conclude that the remedial version of Senate District 21 failed to eliminate the discriminatory aspects of the unconstitutional version, and therefore continues to constitute a racial gerrymander.

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[5] Legislative Defendants' criticism of Dr. Herschlag's analysis for failing to keep municipalities whole is undermined by the fact that one indicium that the remedial district continues to constitute a racial gerrymander is that it divides the city of Fayetteville along racial lines. The proposed 2017 Senate Plan also divides the town of Spring Lake between Senate District 21 and Senate District 19, Fairfax Decl. at 17, further demonstrating that the General Assembly did not place significant weight on preserving municipal lines.

2. Senate District 28

The proposed remedial version of Senate District 28, which is shaped like a reverse "L," sits at the center of Guilford County. Dr. Hofeller drew the version of the district adopted in the 2011 redistricting as a 50%-plus-one BVAP district, and "[a]lthough the portion of the district in Greensboro [wa]s not particularly strange in its shape, an arm of the district protrude[d] west, then hook[ed] south, to capture part of the city of High Point." *Covington I*, 316 F.R.D. at 147. The northeast arm reached into predominantly black sections of Greensboro. This Court concluded that the district constituted a racial gerrymander because it was drawn, using Dr. Hofeller's VRA "exemplar," to be a 50%-plus-one district, was less compact than its benchmark district, added substantially more black voters and subtracted white voters from its benchmark, and split municipalities along racial lines. *Id.* at 147-48. The Court further concluded that compliance with the Voting Rights Act did not provide the General Assembly with the compelling interest necessary to justify its reliance on race, as the State lacked any evidence that "racial bloc voting" would allow the majority to usually to defeat black voters' candidate of choice. *Id.* at 167.

The proposed remedial version of Senate District 28 eliminates the "arm" into High Point included in the previous version, but otherwise tracks the shape of the version of the district held unconstitutional. Indeed, the proposed remedial version's contours more closely follow Dr. Hofeller's VRA "exemplar" than the unconstitutional version, taking on the exemplar's reverse "L" shape and capturing most of the precincts

included in the exemplar. *See* Tr. Ex. 3019-71; Hr'g Pls.' Ex. PD-1. The General Assembly's remedial version reduced the district's BVAP from 56.49 percent to 50.52 percent. Add. Stats. on 2017 Sen. Redistricting Plan, Sept. 7, 2017, ECF No. 184-6. But the BVAP of the remedial version still exceeds that of the benchmark version (47.20%), *Covington I*, 316 F.R.D. at 147, and the 50%-plus-one threshold, establishing that the General Assembly's retention of the unconstitutional version's core and previous use of the majority-black target continues to shape the remedial district's racial make-up.

Whereas the benchmark version of the district had approximately 2,000 more black voters than white voters, the remedial version of the district has approximately 14,000 more black voters than white voters. Add. Stats. on 2017 Sen. Redistricting Plan, Sept. 7, 2017, ECF No. 184-6. Although the district encompasses only a portion of Greensboro, racial density maps reveal that the district encompasses *all* of the majority black VTDs within Greensboro. Fairfax Decl. 5. Notwithstanding that the district excludes predominantly white sections of Greensboro, it reaches out of Greensboro's city limits to capture predominantly African-American areas in eastern Guilford County. And the uncontradicted affidavit of Democratic Senator Gladys Robinson, who represents Senate District 28, avers that under the revisions to the district "the more heavily African-American precincts were included in the district while the predominantly white precinct was removed." Decl. of Sen. Gladys A. Robinson ("Robinson Decl.") 5-6, Sept. 14, 2017, ECF No. 187-5. Although more compact than the unconstitutional version, the remedial district is

among the least compact senate districts in the state and is substantially less compact than its benchmark version. Sen. District Compactness, Sept. 15, 2017, ECF No. 187-9.

Legislative Defendants maintain that "the BVAP level in District 28 is naturally occurring as it is the result of the population residing in those whole precincts that were included in the district." Leg. Defs.' Objs. Resp. 32. But this argument begs—rather than answers—the relevant question: what was the General Assembly's predominant reason for including those particular whole precincts in the district? And the Special Master's Recommended Senate District 28, which significantly improves on the district's compactness and more closely tracks Greensboro's municipal lines, indicates that the district's lines, and therefore its BVAP, were not, in fact, "naturally occurring," but rather a consequence of the district's tracking of the core shape of Dr. Hofeller's VRA exemplar. *See infra* Part IV.B.2.

Legislative Defendants further argue that the district remedies the constitutional violation because a "district anchored in eastern Greensboro that tracks the city boundaries" could not be drawn with a lower BVAP without considering race. Leg. Defs.' Objs. Resp. 32. But Legislative Defendants failed to introduce any evidence, much less race-neutral evidence, establishing that the General Assembly had to "anchor[]" the remedial district in eastern Greensboro—the predominantly black portion of the city that served as the "anchor" of the unconstitutional version of the district. Indeed, by deciding to "anchor" the district in the same predominantly black area as

the unconstitutional version of the district and Dr. Hofeller's exemplar, Dr. Hofeller ensured that the district would retain a high BVAP, thereby perpetuating the effects of the racial gerrymander.

When viewed in totality, the district (1) preserves much of the core shape of the unconstitutional version of the district and Dr. Hofeller's VRA exemplar, (2) continues to have a BVAP that exceeds fifty percent, (3) divides Greensboro's VTDs and precincts along racial lines, and (4) has a low compactness score and is significantly less compact than the benchmark version in the plan in effect in 2010. Based on this evidence, we conclude that the General Assembly carried forward constitutional deficiencies of the previous version of the district and therefore failed to remedy the racial gerrymander.

3. House District 21

Proposed remedial House District 21 runs along the northeast edge of Sampson County into southeast Wayne County. The version of the district that the General Assembly adopted in 2011 included portions of Sampson, Duplin, and Wayne Counties and was drawn to achieve the 50%-plus-one threshold. *Covington I*, 316 F.R.D. at 155. This Court concluded that the district constituted a racial gerrymander because it was "visually less compact" than its benchmark and performed poorly on statistical measures of compactness, it split municipalities and counties along racial lines, and its "racial density map ... indicate[d] that areas with a high proportion of African-American voting-age population [we]re enveloped by the protrusion and contours of House District 21." *Id.* at 155-56. As with the

unconstitutional versions of Senate Districts 21 and 28, we further concluded that compliance with the Voting Rights Act did not provide the General Assembly with the compelling interest necessary to justify its reliance on race, as the State lacked any evidence that "racial bloc voting ... would enable the majority usually to defeat the minority group's candidate of choice." *Id.* at 167.

The proposed remedial version of House District 21 reduced the BVAP from 51.90 percent to 42.34 percent, whereas the benchmark version had a BVAP of 46.25 percent. Add. Stats. on 2017 House Redistricting Plan, Sept. 7, 2017, ECF No. 184-3; *Covington I*, 316 F.R.D. at 158. The district no longer includes any part of Duplin County, which had to be moved to a different county grouping in order to comply with the Whole County Provision, and the revised Wayne County section of the district is more compact. But the Sampson County section of the district conforms to the bizarre shape of the version of the district previously held unconstitutional. To be sure, the unusual borders in Sampson County are attributable in large part to the unusual borders of the selected precincts. But although the Sampson County section generally runs along the eastern edge of the county, the proposed remedial version of the district continues to include a protrusion stretching into the center of the county to capture the disproportionately black sections of the city of Clinton. Fairfax Decl. 6-7, apps. 10-11. The district separates the predominantly black areas of Clinton from the predominantly white areas by splitting a precinct on racial lines. *Id.* When viewed as a whole, the remedial district continues to contain all but one "of the majority black VTDs within

Sampson and Wayne Counties." *Id.* at 6. Although the proposed remedial version of the district is more compact than the previous version, it is the lowest among all 120 House districts on one statistical measure of compactness. House District Compactness, Sept. 15, 2017, ECF No. 187-11.

Considering this evidence as a whole, the district (1) preserves the core shape of the Sampson County section of the previously unconstitutional district, (2) includes all but one of the majority-black VTDs in the two counties through which it runs, (3) divides a municipality and precinct along racial lines, (4) has an irregular shape that corresponds to the racial make-up of the geographic area, and (5) has an extremely low compactness score and is significantly less compact than the benchmark version in the plan in effect in 2010. We find this to be strong evidence that the proposed remedial district fails to remedy the racial gerrymander.

To defend the remedial district's constitutionality, Legislative Defendants assert the district's shape and racial make-up are attributable to the need to "connect" the more compact Wayne County portion of the district to the Sampson County precinct where incumbent Democratic Representative Larry Bell resides and to ensure Representative Bell and Democratic Representative William Brisson,[6] who

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[6] Although Representative Brisson was a member of the Democratic party at the time the House and Senate redistricting plans were enacted, he was the only Democratic House member to vote for both the adopted Senate and House plans on the second and third readings. Leg. Defs.' Objs. Resp. 44 n.9. Following the enactment of the remedial redistricting plans, he announced his intention to change his party registration and run

represents House District 19, which abuts House District 21, would likely prevail in an election in their new districts. Leg. Defs.' Objs. Resp. 42-44. Put differently, according to Legislative Defendants, the district's contours and racial make-up reflect an allegedly legitimate effort by the General Assembly to engage in two forms of incumbency protection: (1) avoiding the "double-bunking" of incumbents and (2) using electoral data to ensure an incumbent is likely to prevail in his new district. We conclude that any interest the General Assembly had in engaging in these two forms of incumbency protection should have given way to the requirement that the remedial plan completely remedy the racial gerrymander. *See supra* Part III.A.

In particular, in order to draw Representative Bell's residence into House District 21, the General Assembly retained much of the bizarre shape of the Sampson County portion of the district and divided a precinct and municipality along racial lines—the very problems that rendered the prior version of the district unconstitutional. Because the General Assembly's incumbency protection efforts served to "validate the very maneuvers that were a major cause of the unconstitutional districting," *Abrams*, 521 U.S. at 86, we find that House District 21 continues to be a racial gerrymander.[7] That the General Assembly sought not

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for a seventh term as a Republican. Lynn Bonner, *An NC House Democrat switches to the GOP*, News & Observer (Oct. 26, 2017, 6:22 PM), http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article180794221.html.

[7] We further note that, as a factual matter, the General Assembly did not need to draw the district to protect

only to avoid pairing incumbents, but also to engage in the more suspect practice of using political data to "exclud[e] ... voters from the district simply because they are likely to vote against the officeholder," *LULAC*, 548 U.S. at 441, reinforces this conclusion, particularly since Legislative Defendants concede that race and political affiliation are highly correlated, Hr'g Tr. 115:8-15. Accordingly, we conclude that proposed House District 21 fails to remedy the racial gerrymander.

4. House District 57

The General Assembly's proposed remedial House District 57 stands in the center of Guilford County. The version of the district adopted in 2011 was drawn to add a third majority black district in Guilford County. *Covington I*, 316 F.R.D. at 163. In order to

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Representative Bell. In particular, several months before Dr. Hofeller drew the remedial districts and the General Assembly enacted Dr. Hofeller's proposed maps, Representative Bell announced that he would not be seeking re-election. See Colin Campbell, *NC Rep. Larry Bell to Step Down Next Year*, News & Observer (Apr. 17, 2017, 5:28 PM), http://www.newsobserver.com/news/politicsgovernment/ state-politics/article145086079.html. During legislative debate regarding the proposed districting plans, at least one legislator expressed concern that the remedial plans were protecting incumbents who already had decided to retire. Statement of Senator Jackson, H. Redist. Comm. Tr. Aug. 25, 2017, at 62:21-24, ECF 184-18 (noting that mapdrawers "should not consider people who have announced their retirements" within the context of incumbency protection). Representative Bell has since confirmed under oath that he publicly announced his intention not to run for re-election in April 2017 and that he will not, in fact, run for re-election in 2018. Decl. of Rep. Larry Bell, Nov. 10, 2017, ECF No. 211-1.

create the third majority black district, the General Assembly "moved and reshaped significantly" the Guilford County house districts included in the benchmark plan. *Id.* Analyzing the 2011 version of House District 57 alongside the other two majority-black districts in Guilford County, we concluded that the district constituted a racial gerrymander because the three districts were unnecessarily drawn to create a third majority African-American district; were "visually less compact" than the Guilford County districts in the benchmark plan; required shifting thousands of African Americans into House District 57 and moving thousands of non-African-Americans out in order to turn it into a majority-black district; created a significant difference between the racial makeup of majority-black districts and the remaining districts in Guilford County; included numerous split precincts; were less compact than the Guilford County districts in the benchmark plan; and, as revealed by racial density maps, were drawn to "encompass areas with a high proportion of voting-age African Americans." *Id.* at 163-64. We further concluded that compliance with the Voting Rights Act did not provide the General Assembly with the compelling interest necessary to justify its reliance on race, as the State presented no evidence that "racial bloc voting" would consistently prevent black voters from electing the candidate of their choice. *Id.* at 167.

The proposed remedial version of House District 57 *increased* the district's BVAP from 50.69 percent to 60.75 percent, whereas the benchmark version had a BVAP of 29.93 percent. Add. Stats. on 2017 House Redistricting Plan, Sept. 7, 2017, ECF No. 184-3; *Covington I*, 316 F.R.D. at 163. Members of the

General Assembly were informed of the significant increase in House District 57's BVAP during the legislative process, but did not alter the district in response to that information. Statement of Rep. Harrison, H. Comm. Redistricting Tr. 119:2-120:1, Aug. 25, 2017, ECF No. 184-18 ("The current African-American composition [of House District 57] is 47 percent and .... [t]he proposed district is now ... 60 percent African American, which doesn't seem to cure the constitutional issue of racial gerrymandering.").

The shape of House District 57 does not follow the shape of the unconstitutional version or the shape of any Guilford County district in the benchmark plan. House District 57's reverse "L" shape does, however, encompass the core of the unconstitutional version of Senate District 28, and closely tracks Dr. Hofeller's VRA exemplar for Guilford County. *See* Tr. Ex. 3019-71; *supra* Part III.B.2. In particular, remedial House District 57 captures the same high BVAP blocks and VTDs in Greensboro included in unconstitutional remedial Senate District 28 and Dr. Hofeller's Guilford County exemplar. Fairfax Decl. 8, apps. 12-14. The vast majority of the VTDs in remedial House District 57 have BVAPs of at least 25 percent, with more than half of the VTDs having BVAPs exceeding 50 percent. *Id.* at 8, app. 12. And the district includes only five VTDs from the predominantly white sections of Greensboro.

The uncontradicted affidavit of State Senator Robinson, who represents Greensboro, averred that in redrawing the district the General Assembly removed a wealthy white neighborhood, Irving Park, and added a "densely populated, heavily African-American

community" in Southeast Greensboro. Robinson Decl. 10-11. The district scores below the statewide mean on measures of compactness.

Similar to their arguments regarding proposed remedial Senate District 28, Legislative Defendants maintain that "the BVAP level in District 57 is naturally occurring as it is a result of the population residing in those whole precincts that were included in the district" and that a district "anchored" in eastern Greensboro and tracking city boundaries could not be drawn with a lower BVAP without considering race. Leg. Defs.' Objs. Resp. 39-40. But, as noted above, the General Assembly has provided no evidence as to why it needed to "anchor" the district in eastern Greensboro, the part of the city with a disproportionately large African-American population. And by tracking the shape of the Greensboro section of unconstitutional Senate District 28 and Dr. Hofeller's VRA exemplar, which included nearly all of the city's high BVAP VTDs, Dr. Hofeller ensured that the district would have a high BVAP, thereby carrying forward the effects of the racial gerrymander. Additionally, the Special Master's recommended reconfiguration of the Guilford County House districts reveals that the General Assembly could have drawn House districts in Guilford County that were more compact and more closely followed Greensboro's municipal lines without drawing House District 57 to mirror the shape of unconstitutional Senate District 28 and Dr. Hofeller's VRA exemplar. *See infra* Part IV.B.4.

Legislative Defendants further assert that we should reject Plaintiffs' objection because their

alternative map would have "double-bunked" incumbents. Leg. Defs.' Objs. Resp. 41-42. But the General Assembly had an obligation to completely remedy the constitutional violation, regardless of whether Plaintiffs—or any other member of the public—provided it with a satisfactory map. And, more significantly, the Special Master's Recommended Plan demonstrates that the General Assembly could have drawn a remedial configuration of the Guilford County House Districts without double-bunking incumbents. *See infra* Part IV.B.4. Accordingly, we find proposed remedial House District 57 fails to completely remedy the racial gerrymander because it (1) encompasses the core of unconstitutional Senate District 28 and Dr. Hofeller's Guilford County VRA exemplar; (2) has an extremely high BVAP level—nearly 40 percent higher than its benchmark version and 10 percent higher than the unconstitutional version; (3) is almost entirely made up of high-BVAP VTDs and excludes predominantly non-black VTDs; and (4) divides the city of Greensboro along racial lines.

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In sum, we find that proposed remedial Senate Districts 21 and 28 and House Districts 21 and 57 fail to completely remedy the constitutional violation. Because the General Assembly failed to enact "a constitutionally acceptable" remedial plan, "then the responsibility falls on th[is] Court" to reconfigure those infirm districts. *Chapman*, 420 U.S. at 27.

B.

Next, Plaintiffs assert that certain aspects of the remedial plan violate the North Carolina

Constitution. In particular, Plaintiffs assert (1) that 2017 Enacted House Districts 36, 37, 40, 41, and 105 violate the constitutional prohibition on mid-decade redistricting, N.C. Const. art. II, §§ 3(4), 5(4); (2) that two groups of districts violate the North Carolina Constitution's so-called "Whole County Provision," *id.* art. II, §§ 3(3), 5(3); and (3) that one district is unconstitutionally noncompact. We address each of these objections in turn.

1.

The North Carolina Constitution provides that "[w]hen established, the [House and] [S]enate districts and the apportionment of [Representatives and] Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress." *Id.* art. II, §§ 3(4), 5(4). Accordingly, the plain and unambiguous language of Sections 3(4) and 5(4) prohibits the General Assembly from engaging in mid-decade redistricting. *Granville Cty. Comm'rs v. Ballard*, 69 N.C. 18, 20-21 (1873) (holding that a state law altering a county boundary was invalid insofar as it would alter the House and Senate districts in violation of the state constitutional prohibition against mid-decade redistricting). Plaintiffs assert that five districts established by the plans (House Districts 36, 37, 40, 41, and 105 in Wake and Mecklenburg Counties) violate the constitutional prohibition on mid-decade redistricting because those districts did not violate the Constitution, did not abut a district violating the Constitution, and did not need to be altered in order to ensure compliance with the Whole County Provision. Pls.' Objs. 37.

The Supreme Court of North Carolina has not addressed the scope of the General Assembly's authority to engage in mid-decade redistricting when a decennial districting plan is found to violate the Constitution or federal law. However, when addressing an analogous question regarding the North Carolina Constitution's Whole County Provision, which immediately follows the constitutional prohibitions on mid-decade redistricting, the Supreme Court of North Carolina held that "[f]ederal law ... preempts the State Constitution only to the extent that the [provision] actually conflicts with the VRA and other federal requirements relating to state legislative redistricting and apportionment." *Stephenson I*, 562 S.E.2d at 396. The North Carolina Supreme Court further held that because it has an obligation to follow the policies established by the people of North Carolina in their Constitution "whenever possible," the redistricting provisions in the North Carolina Constitution "must be enforced to the *maximum extent possible*." *Id.* at 396-97 (emphasis added). In light of this reasoning, we read *Stephenson I* as likewise requiring that the North Carolina Constitution's prohibition on mid-decade redistricting "be enforced to the maximum extent possible." *Id.* Therefore, unless required by federal law or a judicial order, Sections 3(4) and 5(4) preclude the General Assembly from engaging in mid-decade redistricting.

As explained above, the Supreme Court of the United States' decision in *Upham* requires that a federal district court's remedial order not unnecessarily interfere with state redistricting choices. 456 U.S. at 40-41; *see also Johnson v. Miller*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995) ("In

fashioning a remedy in redistricting cases, courts are generally limited to correcting only those unconstitutional aspects of a state's plan."). When a court must draw remedial districts itself, this means that a court may redraw only those districts necessary to remedy the constitutional violation. *Upham*, 456 U.S. at 40-41; *Personhuballah*, 155 F. Supp. 3d at 563 (concluding that in order to comply with state policy "our chosen remedial plan should not alter any districts outside of the [racially gerrymandered district] and those abutting it"). Accordingly, our order did not—and could not—require the General Assembly to redraw districts that did not need to be redrawn to cure the constitutional violation.

Legislative Defendants did not put forward any evidence showing that revising *any* of the five Wake and Mecklenburg County House districts challenged by Plaintiffs was necessary to remedy the racially gerrymandered districts in those two counties. And both the Special Master's proposed map and Plaintiffs' alternative map establish that the racially gerrymandered House districts in Wake and Mecklenburg County could be remedied without redrawing those five districts. Accordingly, there is no "actual[]conflict" between this Court's order and the mid-decade redistricting prohibition. *Stephenson I*, 562 S.E.2d at 396. Therefore, we conclude the General Assembly exceeded its authority under our order by disregarding the mid-decade redistricting prohibition. *See id.* at 388 ("Because Congress has not preempted the entire field of state legislative redistricting and reapportionment, state provisions in this area of law not otherwise superseded by federal law must be accorded full force and effect." (citations omitted));

Cleveland Cty. Ass'n for Gov't by People v. Cleveland Cty. Bd. of Comm'rs, 142 F.3d 468, 477 (D.C. Cir. 1998) (holding that contravention of North Carolina state law governing the at-large election of county commissioners was not warranted as it was not necessary to remedy any violation of federal law or otherwise permitted by a special enactment by the state legislature).

Legislative Defendants nevertheless argue that adopting a standard that permits changes only to those districts not directly impacted by the racial gerrymander—districts that violate the Constitution, abut a district violating the Constitution, or otherwise need to be altered in order to ensure compliance with federal law or state constitutional provisions—would perpetuate a racial gerrymander by "forcing a legislature to use the core of [a] racially gerrymandered district to draw the new district and those immediately surrounding it." Leg. Defs.' Objs. Resp. 52. In particular, for those districts not directly impacted by the racial gerrymander such a standard would "reduce or eliminate the legislature's ability to eliminate the hallmarks of gerrymanders by, for instance, eliminating split precincts, or changing surrounding districts to more closely follow municipal boundaries." *Id.*

But our opinion does not endorse a legislature's preservation of an unconstitutional district's "core" in drawing a remedial district. On the contrary, we find that several of the General Assembly's proposed districts failed to remedy the constitutional violation precisely because they preserved the "core" of the unconstitutional version of the districts. *See supra*

Part III.A. And we do not hold that a state redistricting body tasked with drawing a remedial plan can never redraw districts that were not found to violate the Constitution or abut such a district. Indeed, if Legislative Defendants had put forward evidence establishing that redrawing additional districts was necessary to completely remedy the racial gerrymander, then our Order would have authorized the redrawing of such districts. *Covington III*, 2017 WL 3254098, at *3 (providing the General Assembly with the opportunity to "enact new House and Senate districting plans remedying the constitutional deficiencies"). Legislative Defendants, however, put forward no such evidence. And the Special Master's Recommended Plans for the Wake and Mecklenburg County House districts demonstrate that one can remedy the racial gerrymander—and not preserve the "cores" of the unconstitutional districts—without redrawing districts untainted by the constitutional violations. *See infra* Part IV.B.5-6.

Additionally, the Supreme Court has recognized that "racial gerrymandering claim[s] ... appl[y] to the *boundaries of individual districts*." *Alabama*, 135 S. Ct. at 1265 (emphasis added). Accordingly, remedying a racial gerrymandering violation generally entails redrawing the "boundaries of [those] individual districts," *id.*, not redrawing a districting plan as a whole, as Legislative Defendants' argument suggests. And regardless of whether splitting precincts or failing to follow municipal precinct lines is good from a policy perspective, the failure to follow such policies does not render a state redistricting plan unconstitutional. *Bush v. Vera*, 517 U.S. 952, 962 (1996) (opinion of O'Connor, J.) (explaining that "the

neglect of traditional districting criteria is ... not sufficient" to establish a racial gerrymandering claim); *cf. Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 798 (2017) ("Race may predominate even when a reapportionment plan respects traditional principles."). Rather, a district amounts to a racial gerrymander only if, in drawing the district, "race predominated over traditional race-neutral redistricting principles." *Covington I*, 316 F.R.D. at 129 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)).

2.

The North Carolina Constitution's Whole County Provision states that "[n]o county shall be divided in the formation of a [representative or] senate district." N.C. Const. art. II, §§ 3(3), 5(3). In *Stephenson I*, the Supreme Court of North Carolina recognized that the Whole County Provision must give way to federal law, including the Equal Protection Clause and VRA. 562 S.E.2d at 396 ("Although we discern no congressional intent, either express or implied, to preempt the WCP through the operation of the VRA, we also recognize that the WCP may not be interpreted literally because of the VRA and the 'one-person, one-vote' principles."). The North Carolina Supreme Court further held, however, that the Whole County Provision "should be adhered to by the General Assembly to the maximum extent possible." *Id.* at 391. To that end, the court identified a complex set of nine criteria governing the General Assembly's application of the Whole County Provision in redistricting.

Of particular relevance, one criterion provides that "[w]hen two or more non-VRA legislative districts may be created within a single county, which districts

shall fall at or within plus or minus five percent deviation from the ideal population consistent with 'one-person, one-vote' requirements, single-member non-VRA districts shall be formed within said county." *Id.* at 397. And another criterion provides detailed guidance regarding the drawing of districts encompassing "counties having a non-VRA population pool which cannot support at least one legislative district at or within plus or minus five percent of the ideal population for a legislative district or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the at or within plus or minus five percent 'one-person, one-vote' standard." *Id.* In such counties, the General Assembly must "combin[e] or group[] the minimum number of whole, contiguous counties necessary" to comply with one-person, one-vote. *Id.* In the county groupings, district lines must not traverse the "exterior" line of the county group. *Id.* "[I]nterior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping *but only to the extent necessary*" to comply with one-person, one-vote. *Id.* (emphasis added). Moreover, because "the intent underlying the WCP must be enforced to the maximum extent possible[,] ... only the smallest number of counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard shall be combined." *Id.*

Plaintiffs argue that districts drawn in two county groupings violate these criteria. First, notwithstanding that "Cabarrus County has the population to justify more than two house districts," the remedial House plan includes only one district,

House District 82, wholly within Cabarrus County. Pls.' Objs. 39-40. According to Plaintiffs, the plan's failure to draw two districts within Cabarrus County violates the requirement that the Whole County Provision be maximally enforced and "interior" county lines be traversed "only to the extent necessary." *Id.*

By contrast, Legislative Defendants argue that the Cabarrus County group complies with the Whole County Provision as construed in *Stephenson I* because although it does not maximize the number of districts wholly contained within a single county, it minimizes the number of county-line traversals. Leg. Defs.' Objs. Resp. 54 ("[E]ach grouping must contain the fewest number of traversals possible in creating districts which comply with equal population requirements."). Put differently, according to Legislative Defendants, the Whole County Provision requires minimizing the number of traversals, not the number of multi-county districts in a grouping. To that end, Legislative Defendants also point out that within the relevant county cluster, the Plaintiffs' alternative plan has more traversals of county lines compared with the 2017 Enacted House Plan. *Id.* at 55. In addition, the Plaintiffs' proposed plan alters HD 67 to spread it across three separate counties.

Notwithstanding its extended discussion of the Whole County Provision in *Stephenson I*, the North Carolina Supreme Court has not expounded on the proper application of that provision *within* a multi-county cluster, the issue here, much less whether the Whole County Provision requires maximizing the number of districts wholly contained within a single county or minimizing the number of county-line

traversals in the grouping. Given that this is an unsettled question of state law and support exists for each party's position, we exercise our discretion not to exercise pendent jurisdiction over Plaintiffs' objection related to the Cabarrus County grouping. *See supra* Part II.C; *Robertson*, 148 F. Supp. 2d at 461-62.

Second, Plaintiffs argue that the county grouping including Greene County fails to comply with the Whole County Provision because House District 10 adds population from two counties (Johnston and Wayne) to a county with insufficient population to make a district (Greene), when it is only necessary to add population from one county (Wayne). In support of their position, Plaintiffs rely on *Stephenson I*'s statement that in creating county groupings, the General Assembly must combine the "smallest number of counties necessary to comply with the ... 'one-person, one-vote requirement.'" 562 S.E.2d at 396. That requirement, however, dealt with the creation of county *groupings*, not with the drawing of *interior district lines* within a county grouping, the relevant question. *Id.*

Legislative Defendants again argue that the Greene County configuration complies with the Whole County Provision because it minimizes the number of traversals in the multi-county group. Legislative Defendants further note that Plaintiffs' proposed plan fails to demonstrate that it would be feasible to implement an alternative plan that would minimize such traversals.[8] The Supreme Court of North

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[8] By adopting Plaintiffs' alternative plan, House District 28 would span 3 counties, whereas the version in the 2017 Plan

Carolina has not addressed whether, in the context of a multi-county grouping, the Whole County Provision requires minimizing the number of counties a particular district spans or minimizing the number of county-line traversals in the grouping as a whole. In light of the absence of such guidance from North Carolina courts, we again exercise our discretion not to exercise pendent jurisdiction over Plaintiffs' objection related to the Greene County grouping. *See supra* Part II.C; *Robertson*, 148 F. Supp. 2d at 461-62.[9]

3.

Finally, Plaintiffs argue that Senate District 41 violates the Whole County Provision because it is "grossly non-compact." Pls.' Objs. 41. As noted above, the Whole County Provision provides that "[n]o county shall be divided in the formation of a [representative or] senate district." N.C. Const. art. II, §§ 3(3), 5(3). Accordingly, the plain language of that provision does not address compactness. And in its most recent discussion of the Whole County Provision, the

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spans only 2 counties, presumably in violation of the Plaintiffs' own purported constitutional rule.

[9] Our decision not to exercise pendent jurisdiction over Plaintiffs' objections related to the Cabarrus and Greene County groupings is made without prejudice to Plaintiffs or other litigants asserting such arguments in separate proceedings. We note that there are ongoing proceedings in state court regarding North Carolina's legislative districting plans. *See Dickson v. Rucho*, 804 S.E.2d 184, 185 (N.C. 2017) (remanding case to trial court to determine whether (1) in light of *Cooper v. Harris* and *North Carolina v. Covington*, a controversy exists or if this matter is moot in whole or in part; (2) there are other remaining collateral state and or federal issues that require resolution; and (3) other relief may be proper").

Supreme Court of North Carolina stated that lack of compactness does not "constitut[e] an independent basis for finding a violation, and we are unaware of any justiciable standard by which to measure [lack of compactness]." *Dickson II*, 781 S.E.2d at 440. Given that the Whole County Provision does not mention compactness and the Supreme Court of North Carolina has stated that lack of compactness is not an "independent" basis for striking down an otherwise legal district, we reject Plaintiffs' objection to Senate District 41.

* * * * *

In conclusion, we sustain Plaintiffs' state-law objections as to remedial House Districts 36, 37, 40, 41, and 105, decline to consider Plaintiffs' state-law objections related to the Cabarrus and Greene County groupings, and reject Plaintiffs' state law objection related to proposed remedial Senate District 41.

IV.

Having sustained Plaintiffs' objections to the Subject Districts, this Court now must assume the "unwelcome obligation" of drawing remedial districting configurations for the Subject Districts. *Perry*, 565 U.S. at 392 (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)).[10] To that end, we now consider

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[10] Legislative Defendants reassert their argument that the General Assembly is entitled to a second opportunity to redraw the the Subject Districts. As this Court previously explained in rejecting that argument, "[t]he State is not entitled to multiple opportunities to remedy its unconstitutional districts." Appointment Order 4 (citing *Reynolds*, 377 U.S. at 585-87). To that end, numerous courts have imposed their own remedial redistricting plan after a proposed governmental plan failed to

whether the Special Master's Recommended Plans remedy both the 2011 Plans' constitutional violations and the aspects of the 2017 Plans that render the Subject Districts legally unacceptable; comply with governing law; and adhere, to the extent possible, with the General Assembly's legitimate redistricting objectives. *See Personhuballah*, 155 F. Supp. 3d at 561-65 (examining whether remedial plan prepared by Special Master (1) complied with one-person, one-vote requirement; (2) remedied the identified racial gerrymander; (3) conformed, to the extent possible, with legislative policies embraced in the existing plan; and (4) otherwise complied with governing law); *Johnson*, 922 F. Supp. at 1561-69 (same).

A.

We first examine the Recommended Plans as a whole and find no deficiencies in—and instead, many marked improvements over—the related districts in the 2017 Plan. The Special Master's Recommended Plans comply with one-person one-vote requirements, *i.e.*, all population deviations are within the restrictions imposed by the Equal Protection Clause. *See Alabama*, 135 S. Ct. at 1263 ("[A] 5% deviation

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remedy the identified violation or was otherwise legally unacceptable. *See, e.g.*, *Large*, 670 F.3d at 1148-49 ("[W]e AFFIRM the district court's order that rejected the County's proffered Section 2 remedial plan and implemented a plan of its own design."); *Jeffers*, 756 F. Supp. at 1200; *Osceola Cty.*, 474 F. Supp. 2d at 1256. Legislative Defendants identify no authority to the contrary. That providing the General Assembly with a second bite at the apple would further draw out these proceedings and potentially interfere with the 2018 election cycle further militates against providing the General Assembly with such an opportunity.

from ideal[—(i.e., perfectly equipopulous districts)—is] generally permissible." (citing *Brown v. Thomson*, 462 U.S. 835, 842 (1983))).[11] The recommended districts are consistently more compact under the compactness measures preferred by the General Assembly, with an average increase—as compared to the 2017 Plan—of 13.5 percent in the Reock metric and 11.5 percent in the Polsby-Popper metric. *See* Rec. Plan & Rep. 26. Further, the revised districts in the Recommended Plan split 5 fewer precincts and 2 fewer municipalities than their counterparts in the 2017 Plan. *Id.* at 22, 24, 29. The Recommended Plans also cure the constitutional violation by not tracking the contours of their racially gerrymandered versions, and not dividing municipalities and counties along racial lines. *See id.* at 21-22, 31, 34, 40-41, 45-47. And the recommended reconfigurations of the Wake and Mecklenburg County House districts remedy the racial gerrymanders in the 2011 Plan, while preserving those districts from the 2011 Plan untainted by the unconstitutional districts and

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[11] Generally, courts must strive to draw remedial plans that are as close to equipopulous as possible. *See Abrams*, 521 U.S. at 98 ("Court-ordered districts are held to higher standards of population equality than legislative ones."). Some of the districts in the Recommended Plans hew closely to the 5 percent maximum population deviation selected by the General Assembly and authorized in the Court's Appointment Order. Rec. Plan & Rep. 18. These larger deviations results from the fact that "the Whole County Provision of the State Constitution requires working within a county grouping to achieve equipopulous districts." *Id.* No party takes issue with the population deviations in the Special Master's Recommended Plans. Nor do we discern, in the absence of any challenge having been raised, any violation of the Voting Rights Act or applicable State law.

retaining the features of the 2017 Plan as much as possible. *Id.* at 56-68.

Before examining the Recommended Plans' performance on a district-by-district basis, we first address three objections by Legislative Defendants to the Recommended Plans as a whole: (1) that, in drawing the Recommended Plans, the Special Master impermissibly sought to achieve a specific BVAP quota by "systematically reduc[ing] the [BVAP] in each district"; (2) that the Recommended Plans fail to advance several of the General Assembly's stated or revealed political objectives; and (3) that the Special Master impermissibly drew the plan to favor the Democratic party.

1.

First, Legislative Defendants contend the Special Master "single-minded[ly] focus[ed] on race" and that "the special master's fixation on a racial 'residuum' was used to lower the BVAP of each district to an undisclosed target level." Leg. Defs.' Rec. Plan Resp. 4, 6. This argument wholly disregards the instructions this Court provided to the Special Master—and the Special Master's careful adherence to those instructions—and amounts to a baseless attack on the Special Master's integrity and credibility.

This Court's Appointment Order governing the drawing of the remedial districts did not direct the Special Master to pursue any BVAP target in drawing the remedial districts. Appointment Order ¶ 2. Rather, it stated that the Special Master could "consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan

cures the unconstitutional racial gerrymanders and otherwise complies with federal law." *Id.* at ¶ 2(i).

The Special Master credibly and unambiguously stated that, in drawing the Recommended Plans, "no racial targets were sought or achieved." Special Master's Rec. Plan for the N.C. Sen. & House of Rep. ("Special Master Hr'g Pres.") 37, Jan. 5, 2018, ECF No. 239; Hr'g Tr. 26:8-9. Likewise, the Special Master averred that in accordance with the Court's instructions, "the remedial districts were drawn not with any racial target in mind, but in order to maximize compactness, preserve precinct boundaries, and respect political subdivision lines." Rec. Plan & Rep. 21. To that end, the "Special Master's Plan removes the racial predominance of the [racially gerrymandered districts in the 2017 Plan] by replacing the constitutionally tainted districts with others that adhere to explicitly race-neutral criteria." *Id.* at 21. In particular, the Recommended Plans "do[]not preserve the core shape of the unconstitutional version of the district[s], avoid[]dividing counties and municipalities, and attempt[] to enhance compactness," the Special Master explained. *Id.* at 22. The Recommended Plans achieved those goals, more effectively respecting precinct and municipal lines than the 2017 Plan's versions and improving on the measures of compactness embraced by the General Assembly. *See supra* Part IV.A; *infra* Part IV.B. Accordingly, Legislative Defendants' BVAP targeting argument amounts to a claim that the Special Master made false representations to the Court regarding the approach he followed in drawing the Recommended Plans.

In support of their attack on the Special Master's plans, Legislative Defendants rely on a report and opinion by their proffered expert in census data and geography in redistricting, Dr. Douglas Johnson, who Legislative Defendants retained *after* they had already filed their Response asserting that the Special Master impermissibly pursued racial targets. Hr'g Tr. 78:19-21, 90:7-8, 104:19-22. Dr. Johnson opined as to the Special Master's "[a]pparent [p]redominant [u]se of [r]ace [d]ata" and that "certain racial quotas were targeted by the Special Master when drawing the districts" or "dictated the configuration" of the districts. Expert Rep. of Douglas Johnson, Ph.D. ("Johnson Rep.") 13, 15, 20, Dec. 27, 2017, ECF No. 234-1; *see also* Hr'g Tr. 78:17-19 (opining as to the Special Master's "apparent quota of the African-American percentage of the voting-age population").

In support of his opinion, Dr. Johnson (a) points to "the remarkable similarity in the African-American percentages of the Voting Age Population in the districts drawn by the Special Master"; (b) highlights that the Recommended Plans reduce the BVAP in all of the racially gerrymandered districts in the 2017 Plan; and (c) notes that, for several of the racially gerrymandered districts, Dr. Johnson was able to draw a remedial configuration that, he maintained, more effectively advanced the General Assembly's objectives without bringing the district's BVAP "into the Special Master's remarkably consistent [BVAP] range for his adjusted districts." *Id.* at 13-25. For several reasons, we find Dr. Johnson's analysis and opinion as to the alleged racial targeting in the Recommended Plans unreliable and not persuasive.

To begin, we fail to see how the alleged "remarkable similar[ity]" in the BVAP for districts redrawn in the Special Master's Recommended Plan proves that the Special Master drew his Recommended Plans to achieve a specific target BVAP. Dr. Johnson notes that Recommended Senate Districts 21 and 28 and House Districts 21 and 57 have BVAPs ranging from 38 percent to 44 percent, Johnson Rep. 14—a range Legislative Defendants characterize as "narrow," Leg. Defs.' Rec. Plan Resp. 7. But Dr. Johnson conceded that the fact that several districts' BVAPs fall in a particular range does not prove that "a racial quota was being employed." Hr'g Tr. 98:24-99:6.

Additionally, "correlation [is] not evidence of causation." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 800 (2011). To the extent the BVAPs of those four districts are "remarkabl[y] similar[]"—and Dr. Johnson provides no basis for determining whether the BVAPs of the districts are "similar" from a statistical perspective—any such similarity may be attributable to the underlying demographic make-up of the geographic areas in which the districts are drawn or other non-discriminatory districting considerations, not racial targeting. *See Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1044 (7th Cir. 1988) (Posner, J.); *Ste. Marie v. E. R.R. Ass'n*, 650 F.2d 395, 400 (2d Cir. 1981) (Friendly, J.). And neither Legislative Defendants nor Dr. Johnson offer any controlled statistical analysis ruling out non-discriminatory explanations for the four districts' BVAPs. Absent such evidence, we find that the BVAPs themselves do not prove that the Special Master,

contrary to his unambiguous statements to the Court, engaged in racial targeting.

The Special Master credibly explained why BVAPs decreased in Senate Districts 21 and 28 and House Districts 21 and 57. As he stated in his report, "[t]he fact that the districts happen to reduce the [BVAP] in the redrawn districts, while increasing it in adjoining districts, is to be expected whenever a plan replaces racial predominance with other redistricting principles." Rec. Plan & Rep. 19. Additionally, the Special Master noted that House District 33, which was a racial gerrymander in the 2011 Plan, had a slightly higher BVAP in the Recommended Plan, meaning that, contrary to Dr. Johnson's analysis, the Recommended Plan did not universally decrease the BVAP in redrawn districts that were previously racially gerrymandered. Accordingly, we find that the reduced BVAP in the four districts fails to demonstrate that the Special Master engaged in racial targeting.

Finally, Dr. Johnson provided one alternative configuration for several of the districts in the Recommended Plan, which, according Dr. Johnson, have lower BVAPs and somewhat more effectively adhere to several traditional redistricting criteria, like compactness and population equality.[12] Even assuming Dr. Johnson is correct that his

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[12] Legislative Defendants did not offer these alternative configurations as a potential replacement for either the related Subject District or for the Recommended Plans. Rather, Legislative Defendants solely offered these alternative configurations to criticize the Recommended Plans. *See* Hr'g Tr. 87:1-88:12

configurations more effectively advance these criteria—and reasonable minds could differ as to that conclusion[13]—Legislative Defendants cite no legal authority for the proposition that being able to produce a single alternative districting configuration that somewhat improves on certain districting considerations, while reducing a district's BVAP, establishes that that a mapdrawer intentionally engaged in racial targeting. On the contrary, the Supreme Court has recognized that "a State could construct a plethora of potential maps that look consistent with traditional, race-neutral principles," some of which may involve impermissible racial targeting, and others of which may not. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017); *Vera*, 517 U.S. at 967 ("If, as may commonly happen, traditional districting principles are substantially followed without much conscious thought, they cannot be said to have been 'subordinated to race.'"). Likewise, Dr. Johnson conceded that minor differences between two proposed maps do not signal that one version is legally unacceptable or better achieves traditional redistricting goals. Hr'g Tr. 92:23-93:3.

Beyond the alleged similarities in the districts' BVAPs and Dr. Johnson's alternative maps, Legislative Defendants offer no other direct or circumstantial evidence indicating that the Special Master used racial targets in drawing the districts'

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[13] For example, Dr. Johnson's rendering of Senate District 28 in Guilford County less closely tracks Greensboro's municipal boundaries than the Recommended Plan's version. *Compare* Johnson Rep. 23, *with* Rec. Plan & Rep. 39.

lines. Legislative Defendants' failure to put forward such evidence is particularly notable when compared with the extensive direct, circumstantial, and expert evidence that this Court relied upon both to find the that 2011 Plans relied unjustified race-based districting, *Covington I*, 316 F.R.D. at 130-65, and to find that the 2017 Plans failed to remedy the identified racial gerrymanders in Senate Districts 21 and 28 and House Districts 21 and 57, *see supra* Part III.A.1-4.

In sum, Dr. Johnson's report and testimony do not in any way call into question the Special Master's repeated, credible, and unambiguous statements—made in his capacity as an officer of the Court—that he did not engage in racial targeting, and that any changes to the BVAP of districts in his Recommended Plan are attributable to his efforts to achieve the non-discriminatory redistricting objectives set forth in this Court's Appointment Order.

2.

Legislative Defendants next contend that the Recommended Plans fail to achieve several of the General Assembly's statewide or district-specific political objectives. In particular, Legislative Defendants assert that certain districts in the Recommended Plan fail to accomplish the legislature's goals of ensuring that a Republican candidate had an opportunity to prevail in a particular district or that a particular incumbent would win in his new district. Leg. Defs.' Rec. Plan Resp. 9, 15.

But the Supreme Court long has held that courts lack "political authoritativeness" and, therefore, must act "in a manner free from any taint of arbitrariness

or discrimination" in drawing remedial districts. *Wise v. Lipscomb*, 437 U.S. 535, 541 (1978) (quoting *Connor v. Finch*, 431 U.S. 408, 417 (1977)). To that end, in drawing a remedial plan, a court may not draw district lines solely to advance partisan or political objectives, even when the state redistricting body expressly adopted such objectives. *See, e.g., Wyche v. Madison Par. Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts."); *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981) (noting that "a court is forbidden to take into account the purely political considerations that might be appropriate for legislative bodies"); *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1093 (D. Kan. 2012) (declining to unpair certain incumbents in remedial district plan because "any efforts to protect [such] incumbents would require our choosing among incumbents, an inherently political exercise we are neither able nor inclined to undertake"); *Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 668 (D.S.C. 2002) ("[E]ven were we to agree that [a proposed change to a district configuration] had some political benefit, such an important change to the core of an existing district in a [court-drawn] redistricting plan, based on nothing more than our determination that one elected official will do a better job than another, is clearly beyond the scope of our remedial authority."). Accordingly, the Special Master's alleged failure to achieve the General Assembly's partisan objectives in no way calls into question the legal adequacy of the Recommended Plans.

3.

Finally, Legislative Defendants maintain that the Special Master drew the Recommended Plans to favor Democrats. Leg. Defs.' Rec. Plan Resp. 2. The *only* support Legislative Defendants provide for this assertion is an article in the Raleigh *News & Observer*, which opined that Democratic candidates had a better chance of prevailing in several of the districts in the Recommended Plans than in such districts' counterparts in the 2017 Plans. *See id.* (citing Colin Campbell & Bruce Henderson, *Redrawn Election Maps Would Help Democrats*, News and Observer, Nov. 28, 2017, at 2A). Even assuming that the reporters are correct that the Recommended Plans are more favorable to Democratic candidates than the 2017 Plans—and Legislative Defendants introduced no analysis of their own showing that that is in fact the case—that does not establish that the Special Master drew the districts to favor Democrats. *See Brown*, 564 U.S. at 800 ("[C]orrelation [is] not evidence of causation."). Rather, any adverse consequences on the electoral prospects of Republican candidates may simply derive from the Special Master's duty to draw plans that completely eliminate the vestiges of the racial gerrymanders, rather than an intentional effort to benefit any candidate of either political party. And Legislative Defendants present no evidence, much less a rigorous empirical analysis, demonstrating that the Special Master could have drawn districts that completely remedied the racial gerrymander that were more favorable to Republican candidates.

More significantly, this Court's Appointment Order barred the Special Master from taking into account political considerations in drawing his remedial plans, except for the purpose of preventing the pairing of incumbents. Appointment Order 7. Legislative Defendants offer no evidence that the Special Master disregarded this instruction. On the contrary, the Special Master repeatedly averred that he complied with all of the Court's instructions set forth in the Appointment Order, including the instruction that he take a nonpartisan approach in drawing his Recommended Plans. Hr'g Tr. 8:23-9:16; Rec. Plan & Rep. 11 (stating that the Special Master's "nonpartisan approach ... is absolutely critical to bolstering the legitimacy of the Special Master's Plan"). And the Special Master took a number of steps "[t]o avoid even the appearance of partisanship," including rejecting Plaintiffs' proposed plans as unduly favorable to Democratic candidates and unpairing incumbents of both parties, notwithstanding that Legislative Defendants never requested that the Special Master unpair Republican incumbents. Rec. Plan & Rep. 12-14, 30. Accordingly, Legislative Defendants' assertion that the Recommended Plans were drawn to favor Democratic candidates finds no record support.[14]

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[14] Legislative Defendants also take issue with what Dr. Johnson describes as the Special Master's "bewildering[]" labeling of municipality splits as "Municipalities (CDPs)," Johnson Report 6—a critique they failed to raise in commenting on the Special Master's draft plan. "Municipalities" and "CDPs" differ insofar as municipalities are officially recognized local governments within a particular state, whereas CDPs are "settled concentrations of population that are identifiable by

B.

Having rejected Legislative Defendants' objections to the Recommended Plans as a whole, we now examine the Recommended Plans on a district-by-district basis.

1. Senate District 21

Like the version of Senate District 21 in the 2011 and 2017 Plans, the Special Master's Recommended Senate District 21 encompasses all of Hoke County and a portion of Cumberland County. Rec. Plan & Rep. 31. But unlike the General Assembly's proposed remedial version in the 2017 Plan, the Special Master's recommended version no longer retains the core shape of the Cumberland County portion of the unconstitutional 2011 version of the district. *Id.* at 32.

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name but are not legally incorporated under the laws of the state in which they are located." *Id.* at 5. Dr. Johnson asserts that the Special Master's data labeling indicates that he potentially conflated the two terms and therefore may have failed to correctly ascertain the number of municipal splits.

Dr. Johnson conceded, however, that he "d[id] not have sufficient time ... to rerun the [Special Master's 'Municipalities (CDPs)'] tables using only municipalities." *Id.* at 6. Therefore, his opinion that "the tables would show different results if only the 533 municipalities are analyzed instead of [what] ... the Special Master appears to have used in his analysis" lacks any empirical basis. *Id.* at 6. The Special Master responded directly to Dr. Johnson's criticism at the hearing, credibly explaining that although there are differences between CDP- and municipality-based boundaries, the few minor differences in the relevant North Carolina districts in no way materially affected the boundaries and municipality-split calculations in the Recommended Plan. Hr'g Tr. 10:7-11:8; *see also* Special Master Hr'g Pres. 5-8. Accordingly, we find this alleged deficiency in the Special Master's Recommended Plan to be without merit.

Most notably, Recommended Senate District 21 no longer includes proposed remedial Senate District 21's "long extension into Fayetteville that seems surgically designed to capture heavily African American precincts, while evading heavily white precincts." *Id.* at 31; *see supra* Part III.A.1.

Recommended Senate District 21 and its partner in the Hoke-Cumberland grouping, Recommended Senate District 19, satisfy the Constitution's one-person, one-vote requirement. *Id.* at 33. Both recommended districts improve on the compactness of their counterparts in the 2017 Plan under the measures of compactness adopted by the General Assembly. *Id.* And the Recommended Plan's configuration reduces the number of split precincts and municipalities in both districts, in accordance with the Adopted Criteria. *Id.*

Legislative Defendants object to Recommended Senate District 21 on two grounds. First, they claim that its lines are the product of intentional racial targeting, Leg. Defs.' Rec. Plan Resp. 8-10—a contention we already have rejected, *see supra* Part IV.A.1. Second, Legislative Defendants assert that the Recommended Plan violates the General Assembly's political decision to "place the Fort Bragg precinct in [Senate District] 19 ... in order to provide the Republican incumbent ... with an opportunity to win that district." Leg. Defs.' Rec. Plan Resp. 9. However, as noted previously, a court—or a special master acting on a court's behalf—is barred from considering partisan or political objectives in drawing a remedial districting plan. *See supra* Part IV.A.2. And even if a court tasked with drawing a remedial districting plan

was entitled to give effect to partisan objectives—like ensuring the Republican incumbent would prevail in his new district—any legislative interest in protecting an incumbent must yield to remedying the unconstitutional racial gerrymander if necessary. *See supra* Section III.A. Therefore, we reject Legislative Defendants' objections and approve the Recommended Plan's reconfiguration of Senate District 21.

2. Senate District 28

Like the General Assembly's proposed remedial version, Recommended Senate District 28 lies in the center of Guilford County. Unlike the General Assembly's proposed remedial version of the district, Recommended Senate District 28—which takes on a highly compact circular shape almost wholly within the municipal boundaries of Greensboro—no longer divides Greensboro along racial lines, nor does it track the contours of Dr. Hofeller's VRA exemplar. Rec. Plan & Rep. 34-36; *see supra* Part III.A.2.

Recommended Senate District 28 abuts Senate Districts 24 and 27; however, the Special Master's Recommended Plan leaves the version of Senate District 24 in the 2017 Plan largely unchanged. *See* Rec. Plan & Rep. 35. The recommended configuration decreases Senate Districts 27's population deviation by 2.0 percentage points, and increases Senate District 28's population deviation by 0.5 percent. *Id.* at 36. Both Recommended Senate District 27 and 28 improve on their counterparts in the 2017 Plan in terms of the compactness measures included in the Adopted Criteria. *Id.* And in accordance with the Adopted Criteria, the recommended districts split fewer municipalities and precincts than their

counterparts in the 2017 Plans—Senate District 27 would split one fewer precinct and Senate District 28 would split two fewer precincts and one fewer municipality. *Id.*

In addition to reasserting their unsupported contention that Recommended Senate District 28 was the product of racial targeting, Legislative Defendants also object to the recommended configuration because two incumbents are paired in Recommended Senate District 27. Leg. Defs.' Rec. Plan Resp. 11-12. But neither Legislative Defendants nor Plaintiffs asked the Special Master to unpair the incumbents—one of whom is a Democrat and one of whom is a Republican—notwithstanding that the Special Master expressly provided them an opportunity to suggest approaches for unpairing the incumbents. Rec. Plan & Rep. 37. And we find that the Special Master reasonably recommended against unpairing the incumbents because doing so "would require significant restructuring of the district" and that potential alternative plans for the districts would either take both incumbents "out of the territory that comprises most of their present districts" or significantly reduce the district's compactness. *Id.* at 37-38. Finding that the Recommended Senate District 28 cures the racial gerrymander and that Legislative Defendants' objections are without merit, we approve the Recommended Plan's reconfiguration of Senate District 28.

3. House District 21

Like its predecessor in the 2017 Plan, Recommended House District 21 spans a portion of Wayne County and the eastern edge of Sampson

County. Rec. Plan & Rep. 42. Unlike the unconstitutional version of the district and version of the district in the 2017 Plan, Recommended House District 21 no longer includes a protrusion into central Sampson County to take in the majority-black sections of the City of Clinton, while excluding the city's majority-white sections. *Id.* at 40.

The recommended configuration of House District 21 and its neighbor, House District 22, satisfies the one-person, one-vote requirement. *Id.* at 43. And the recommended configuration also, on average, improves on the two districts' compactness, as measured by the General Assembly's two preferred metrics. *Id.* Recommended House District 21 has the same number of municipality or precinct splits as the version in the 2017 Plan, whereas Recommended House District 22 splits one fewer municipality than its counterpart in the 2017 Plan. *Id.*

Legislative Defendants again argue that Recommended House District 21's reduced BVAP relative to the version in the 2017 Plan is a product of BVAP targeting—a contention which finds no support in the record. *See supra* Part IV.A.1. Legislative Defendants further argue that Recommended House District 21 does not protect its incumbent as effectively as the version of the district in the 2017 Plan. But the Special Master was not authorized to draw a district to ensure an incumbent will prevail. *See supra* Part IV.B.2.[15] Accordingly, we reject

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[15] Even if the Special Master had been so authorized, the incumbent in House District 21 has stated under oath that he will not run for re-election in 2018, Decl. of Rep. Larry Bell, Nov. 10, 2017, ECF No. 211-1, meaning that there was no need for the

Legislative Defendants objections and approve the Special Master's remedial configuration of House District 21.

4. House District 57

As with the version in the 2017 Plan, Recommended House District 57 lies wholly within Guilford County. However, unlike the 2017 Plan version, the Special Master's recommended version of the district no longer includes virtually all of the heavily black precincts in eastern Greensboro, which were included in Dr. Hofeller's Guilford County VRA exemplar. Rec. Plan & Rep. 45. And whereas the version of House District 57 in the 2017 Plan had a BVAP exceeding 60 percent—a substantially *higher* BVAP than its unconstitutional version—by no longer dividing Greensboro's precincts along racial lines, Recommended House District 57 has a BVAP of 38.4 percent. *Id.* at 50.

In order to reconfigure House District 57 to remedy the racial gerrymander, the Special Master had to reconfigure several other House districts in Guilford County (House Districts 59, 61, and 62). The Special Master's reconfiguration of those districts more effectively respects municipal boundaries than the 2017 Plan, containing three districts that lie almost entirely within Greensboro's city limits. *Id.* at 46-48. Additionally, pursuant to his obligation to respect the General Assembly's redistricting decisions to the extent possible, the Special Master maintained the shape of House Districts 58 and 60, as they were

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Special Master to consider incumbent protection in redrawing the district.

drawn in the 2017 Plan. *Id.* at 45 ("The Special Master's Recommended Plan redraws House District 57, but keeps intact the other "Subject Districts" (House Districts 58 and 60) as redrawn in the 2017 Plan."). Each of the reconfigured districts satisfies the one-person, one-vote requirement. *Id.* at 49. The Recommended Plan's configuration is as compact as the 2017 Plan, and more compact than the 2011 Plan, in accordance with the Adopted Criteria. *Id.* Further, the recommended configuration does not pair any incumbents, and each incumbent retains a majority of his or her constituency from the 2017 Plan. *Id.* at 51.

Legislative Defendants again argue that "the most significant difference in these two versions of [district] 57 is the BVAP," and that the "shape difference" between the two versions is "explained by policy decisions which had nothing to do with race." Leg. Defs.' Rec. Plan Resp. 16-17. However, Legislative Defendants nowhere identify the nature of these alleged "policy decisions" (stating only, "The 2017 district is based upon whole precincts located primarily in eastern Greensboro."), *id.*, making it impossible for this Court to determine both whether the Special Master's recommended configuration in fact failed to advance those objectives and whether the Special Masters should have—or legally could have—advanced those objectives. Legislative Defendants also characterize Recommended District 61's increase in BVAP "from 11.5% to ... 40.3%" as "astonishing," maintaining that the district "would have been labeled a racial gerrymander" if the General Assembly had recommended such a configuration. *Id.* at 17. But the Special Master did not target any BVAP percentage in drawing the Recommended Plans. *See supra* Part

IV.A.1; Rec. Plan & Rep. 53. The increase in Recommended District 61's BVAP is attributable to shift of voters from the General Assembly's proposed House District 57, which had a BVAP exceeding 60 percent, into Recommended House District 61, and was therefore a consequence of the Special Master's obligation to remedy the racial gerrymander. *Id.* at 50. Thus, we reject Legislative Defendants' objections and approve the Special Master reconfiguration of the Guilford County House districts.

5. Wake County House Districts

As the Special Master correctly recognized, the problem with the Wake County House district configuration in the 2017 Plan—that the General Assembly violated the North Carolina Constitution by redrawing districts untainted by the constitutional violation—is "characteristically different" than the four districts in the 2017 Plan that failed to remedy the racial gerrymander. *Id.* at 56. The Special Master, therefore, took a different approach to reconfiguring the Wake County districts. *Id.* at 56-57. In particular, the Special Master first "reinstate[d]" the four untainted Wake County districts from the 2011 Plan that the General Assembly altered in the 2017 Plan. *Id.* at 57. Then, he reconfigured some of the remaining Wake County districts so as to cure the racial gerrymander, satisfy the one-person, one-vote requirement, and improve on the districts' compactness and adherence to precinct and municipal lines, as required by the Adopted Criteria. *Id.* at 57-58. The Special Master left intact two 2017 Plan districts, which he did not need to change to remedy

the violation and made only minor changes to a third. *Id.* at 57.

The Recommended Wake County House plan satisfies the one-person, one-vote requirement. *Id.* at 60. The districts in the Special Master's recommended Wake County configuration are uniformly more compact and split fewer municipalities and precincts than those in the 2011 Plan configuration, in accordance with the Adopted Criteria. *Id.* at 60-61. The Special Master's configuration is slightly less compact, on average, than the 2017 Plan, and splits more municipalities and precincts. *Id.* These differences are attributable to the Special Master's obligation to reinstate the untainted districts in the 2011 Plan, which were less compact and split more municipalities and precincts than their counterparts in the 2017 Plan. *Id.* The Special Master's Recommended Plan does not pair any incumbents in Wake County. *Id.*

Legislative Defendants object to the Special Master's reconfiguration of the Wake County districts in his Recommended Plan on grounds that it unpaired two Democratic incumbents that were paired in his draft plan. Leg. Defs.' Rec. Plan Resp. 19-20. But the General Assembly's incumbency criterion expressed a preference for not pairing incumbents of "either party" in a district. Adopted Criteria for House and Senate Plans, Sept. 7, 2017, ECF No. 184-37. And in accordance with that legislative policy preference, this Court directed the Special Master to unpair incumbents if doing so would "not interfere with remedying the constitutional violations and otherwise complying with federal and state law." Appointment

Order 7. The Special Master reasonably concluded that unpairing the Democratic incumbents—which required moving six precincts between the two districts and did not materially impact the Recommended Plan's compactness or respect for municipal and precinct boundaries—did not undermine the integrity of his plan. Rec. Plan & Rep. 62. Therefore, we again reject Legislative Defendants' objections and approve the Special Master's recommended reconfiguration of the Wake County House districts.

6. Mecklenburg County House Districts

Like the Wake County House district configuration, the Mecklenburg County House district configuration in the 2017 Plan unnecessarily, and therefore unconstitutionally, altered the version of House District 105 in the 2011 Plan, which was not impacted by the identified constitutional violation. *Id.* at 64. In redrawing the Mecklenburg County configuration, the Special Master restored the lines of House District 105 to those in the 2011 Plan and, as a result, had to somewhat alter only three adjoining districts (House Districts 92, 103, and 104). *Id.* at 64. In doing so, the Special Master sought "to keep precincts whole (outside of those already split by [the] 2011 [Plan's] District 105), to keep the districts in the area relatively compact and contiguous, and to make only the changes necessary to remedy the constitutional violation." *Id.* The Special Master's configuration is slightly less compact, on average, than that of the 2017 Plan, and splits more precincts. *Id.* These differences are attributable to the Special Master's obligation to reinstate the version of House

District 105 in the 2011 Plan, which was noncompact and split a number of municipalities and precincts. *Id.* at 65-67. No party asserts any specific objection to the Special Master's reconfiguration. Therefore, we approve the Special Master's Recommended Plan for the Mecklenburg County House districts.

V.

Finally, we consider the remaining districts of the 2017 Plans unaffected by our decision today. We earlier found the following additional districts unconstitutional gerrymanders: Senate Districts 4, 5, 14, 20, 32, 38, and 40; and House Districts 5, 7, 12, 24, 29, 31, 32, 38, 42, 43, 48, 58, 60, 99, 102, 107. The General Assembly enacted the 2017 Plans to remedy the constitutional violations related to each of these districts. The Supreme Court has provided that "[t]he new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution." *Wise*, 437 U.S. at 540.

No party has raised a substantive challenge to any of these districts, and therefore no party has provided this Court with evidence that the 2017 Plans fail to remedy the constitutional violations we identified. In the absence of any finding that the remedial districts offend the Constitution or Voting Rights Act, these districts are entitled to the presumption of constitutionality afforded an enactment of a duly elected legislature. *Upham*, 456 U.S. at 43; *Wise*, 437 U.S. at 540. Under these circumstances, our district-by-district review cannot discern any apparent failure to adequately remedy the specific constitutional violation this Court identified. Therefore, the Court will approve and adopt the

remaining remedial districts in the 2017 Plans for use in future elections in the State. *See Shaw v. Hunt*, No. 92-202-CIV-5-BR, slip op. at 8 (E.D.N.C. Sept. 12, 1997) (three-judge court approving remedial legislative plan enacted to remedy racial gerrymander in the absence of challenge by any party).

VI.

In conclusion, for the reasons stated above, we sustain Plaintiffs' objections to the Subject Districts and approve and adopt the State's 2017 Plans, as modified by the Special Master's Recommended Plans, for use in future North Carolina legislative elections. Accordingly, this Court's previous injunction against the State from conducting any elections for State House and State Senate offices, Order and Judgment, Aug. 15, 2016, ECF No. 125, is dissolved. We direct Defendants to implement the Special Master's Recommended Plans.

SO ORDERED

Appendix B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

No. 1:15-CV-399

SANDRA LITTLE COVINGTON, et al.,
Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, et al.,
Defendants.

November 1, 2017

ORDER

On August 11, 2016, this Court unanimously concluded that the Defendants unjustifiably relied on race in drawing lines creating twenty-eight majority-minority districts in the 2011 state legislative districting plans, in violation of the Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment. *Covington v. North Carolina*, 316 F.R.D. 117, 176 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017) (mem.). To remedy the constitutional violation, the North Carolina General Assembly enacted proposed remedial plans on August 31, 2017. On September 15, 2017, the Plaintiffs filed objections to three Senate districts and nine House districts created by the proposed remedial plans. Thereafter, the Legislative Defendants filed a response to Plaintiffs' objections.

This Court held a hearing concerning the objections on October 12, 2017.

After careful review of the parties' written submissions, arguments, and evidence, the Court has serious concerns that 2017 Enacted Senate Districts 21 and 28 and 2017 Enacted House Districts 21 and 57 fail to remedy the identified constitutional violation. *See id.* at 146 47 (Senate District 21); *id.* at 147-48 (Senate District 28); *id.* at 155-56 (House District 21); *id.* at 163-64 (House District 57). Among other concerns, some or all of the proposed remedial districts preserve the core shape of the unconstitutional version of the district, divide counties and municipalities along racial lines, and are less compact than their benchmark version. In some cases, the General Assembly's use of incumbency and political data in drawing its proposed remedial districts embedded, incorporated, and perpetuated the impermissible use of race that rendered unconstitutional the 2011 districts. The 2017 Enacted Districts do not appear to cure the constitutional violations found as to 2011 Enacted House Districts 21 and 57 and Senate Districts 21 and 28. The Court is concerned that, among other things, some of the districts proposed by the Plaintiffs may be the result of impermissible political considerations. *See infra* ¶ 2(h).

The Court further has serious concerns that the 2017 redrawing of 2011 Enacted House Districts 36, 37, 40, and 41 in Wake County and House District 105 in Mecklenburg County exceeded the authorization to redistrict provided in the Court's previous orders. None of these districts as enacted in 2011 was found

to be an unconstitutional racial gerrymander, nor do any of these districts adjoin such a district. The Legislative Defendants have not provided any evidence that it was necessary to redraw these districts in order to cure the constitutional violations found by the Court as to 2011 House Districts 33 and 38 in Wake County or House Districts 99, 102, or 107 in Mecklenburg County. Unless required by court order, the General Assembly was prohibited by the North Carolina Constitution from redrawing these districts. N.C. Const. art. II §§ 3(4), 5(4). If these 2017 Enacted Districts cannot be used, it also becomes impossible to use the other 2017 Enacted Districts in Mecklenburg and Wake Counties, thus necessitating the redrawing of the 2011 unconstitutional districts—House Districts 33, 38, 99, 102, and 107—and only such adjoining districts as are necessary to remedy the violations found as to those districts. *See Covington*, 316 F.R.D. at 159-61 (House Districts 33 and 38); *id.* at 164-66 (House Districts 99, 102, and 107); *see also Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs*, 142 F.3d 468, 477 (D.C. Cir. 1998) (per curiam) ("[I]f a violation of federal law *necessitates* a remedy barred by state law, the state law must give way; if no such violation exists, principles of federalism dictate that state law governs." (emphasis added)).

Constitutionally adequate districts must be in place in time for the 2018 election, and the Court finds it appropriate to appoint a Special Master to assist the Court in drawing such districts, should the Court ultimately determine they are necessary. *See* Doc. 202 at 2. After reviewing the Special Master's report, and with the benefit of his analysis, this Court will issue

an order finally deciding whether the Plaintiffs' objections will be sustained and determining the districting plan to be used going forward. *See Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 562-65 (E.D. Va. 2016) (relying on special master report and remedial districting plan to assess proposed legislative remedial plan); Order Appointing Special Master, *Navajo Nation v. Ariz. Indep. Redistricting*, Nos. CV 02-0799, 02-0807 (D. Ariz. May 17, 2002) (appointing special master "to evaluate evidence regarding proposed redistricting plans," including remedial plan adopted by state redistricting body, and to "assist the court in developing an appropriate plan").

In view of the fast-approaching filing period for the 2018 election cycle and the specialized expertise necessary to draw district maps, the Court has previously given notice of its intent to appoint Professor Nathaniel Persily as Special Master pursuant to Federal Rule of Civil Procedure 53(a)(1)(C). *See* Doc. 202. The Court's selected Special Master has filed the affidavit required by Federal Rule of Civil Procedure 53(b)(3)(A). Doc. 203.

The parties have had an opportunity to object to the Court's selection of a Special Master. The Legislative Defendants filed objections, Doc. 204, and the Plaintiffs have responded. Doc. 205. The Court has considered those objections and overrules them. The State is not entitled to multiple opportunities to remedy its unconstitutional districts. *See Reynolds v. Sims*, 377 U.S. 533, 585-87 (1964) (affirming remedial districting map drawn by a district court after district court found state legislature's first proposed remedial

map failed to remedy constitutional violation). Additionally, the fast-approaching candidate filing deadline necessitates an expedited schedule. In light of the need for an expedited schedule, the Court's two notices of its intent to appoint a special master, the first of which was issued approximately three weeks ago, provided the parties with more than adequate notice and opportunity to be heard. It is comparable to the timeline followed in similar cases. *See* Order, *Personhuballah v. Alcorn*, No. 3:13cv678, Doc. No. 241 (E.D. Va. Sept 25, 2015) (appointing special master approximately three weeks after first notifying parties of its intent to appoint special master); *see also* Order, *Personhuballah v. Alcorn*, No. 3:13cv678, Doc. No. 207 (E.D. Va. Sept. 3, 2015) (notifying parties of intent to appoint special master). The Legislative Defendants' specific objections to the identified Special Master are speculative and insubstantial, and they have not made an alternative suggestion despite the Court's invitation to do so.

Pursuant to Federal Rule of Civil Procedure 53, it is hereby ORDERED that:

1. Dr. Nathaniel Persily is appointed as a Special Master to submit a report and proposed plans to remedy the unconstitutional racial gerrymander of 2011 Enacted Senate Districts 21 and 28 and House Districts 21, 33, 38, 57, 99, 102, and 107 (hereinafter the "Subject Districts"), as more specifically identified in this Court's opinion in *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd in relevant part*, 137 S. Ct. 2211 (2017)

(mem.). His report is due no later than December 1, 2017.

2. In drawing remedial districts, the Special Master shall:

    a. Redraw district lines for the Subject Districts and any other districts within the applicable 2017 county grouping necessary to cure the unconstitutional racial gerrymanders. As to House District 57, the redrawn lines shall also ensure that the unconstitutional racial gerrymanders in 2011 Enacted House Districts 58 and 60 are cured. As to 2011 Enacted House Districts 33, 38, 99, 102, and 107, no 2011 Enacted House Districts which do not adjoin those districts shall be redrawn unless it is necessary to do so to meet the mandatory requirements set forth in Paragraphs 2(b) through 2(e) of this Order, and if the Special Master concludes that it is necessary to adjust the lines of a non-adjoining district, the Special Master shall include in his report an explanation as to why such adjustment is necessary.

    b. Use the 2010 Federal Decennial Census Data;

    c. Draw contiguous districts with a population as close as possible to

79,462 persons for the House Districts and 190,710 persons for the Senate Districts, though a variance up to +/- 5% is permitted and authorized if it would not conflict with the primary obligations to ensure that remedial districts remedy the constitutional violations and otherwise comply with state and federal law, would enhance compliance with state policy as set forth in subsection (f) below, and would not require redrawing lines for an additional district.

d. Adhere to the county groupings used by the General Assembly in the 2017 Enacted Senate and House Plans;

e. Subject to any requirements imposed by the United States Constitution or federal law, comply with North Carolina constitutional requirements including, without limitation, the Whole County Provision as interpreted by the North Carolina Supreme Court.

f. Make reasonable efforts to adhere to the following state policy objectives, so long as adherence to those policy objectives does not conflict with the primary obligations of ensuring that remedial districts remedy the constitutional violations and

otherwise comply with state and federal law:

i. Split fewer precincts than the 2011 Enacted Districts;

ii. Draw districts that are more compact than the 2011 Enacted Districts, using as a guide the minimum Reock ("dispersion") and Polsby-Popper ("perimeter") scores identified by Richard Pildes & Richard Neimi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993); and

iii. Consider municipal boundaries and precinct lines.

g. After redrawing the districts, in view of the policy decision by the General Assembly that efforts to avoid pairing incumbents are in the interest of North Carolina voters, the Special Master may adjust district lines to avoid pairing any incumbents who have not publicly announced their intention not to run in 2018, but only to the extent that such adjustment of district lines does not interfere with remedying the constitutional violations and

otherwise complying with federal and state law. Additionally, the Special Master shall treat preventing the pairing of incumbents as "a distinctly subordinate consideration" to the other traditional redistricting policy objectives followed by the State. *Ga. State Conf. of NAACP v. Fayette Cty. Bd. of Comm'rs*, 996 F. Supp. 2d 1353, 1363 (N.D. Ga. 2014) (collecting cases).

h. Except as authorized in Paragraph 2(g), the Special Master shall not consider incumbency or election results in drawing the districts. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535, 541 (1978) (noting that courts lack "political authoritativeness" and must act "in a manner free from any taint of arbitrariness or discrimination" in drawing remedial districts) (quoting *Connor v. Finch*, 431 U.S. 408, 417 (1977)); *Wyche v. Madison Par. Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts."); *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981) (noting that "a court is forbidden to

take into account the purely political considerations that might be appropriate for legislative bodies"); *Favors v. Cuomo*, Docket No. 11-cv-5632, 2012 WL 928216, at *18 (E.D.N.Y. Mar. 12, 2012), *report and recommendation adopted as modified*, No. 11-cv-5632, 2012 WL 928223, at *6 (E.D.N.Y Mar. 19, 2012),; *Molina v. Cty. of Orange*, No. 13CV3018, 2013 WL 3039589, at *8 (S.D.N.Y. June 3, 2013), *supplemented*, No. 13CV3018, 2013 WL 3039741 (S.D.N.Y. June 13, 2013), *report and recommendation adopted*, No. 13 CIV. 3018 ER, 2013 WL 3009716 (S.D.N.Y. June 14, 2013); *Larios v. Cox*, 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004); *Balderas v. Texas*, No. 6:01CV158, 2001 WL 36403750, at *4 (E.D. Tex. Nov. 14, 2001).

i. The Special Master may consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders and otherwise complies with federal law.

3. The Special Master may consider the plans submitted by the Plaintiffs and the 2017 Enacted plans as background. Because any remedy must be narrowly tailored to

address the harm, he further should use any 2017 Enacted Districts within a relevant county grouping which do not abut or overlap with a Subject District, except to the extent modification of such district is necessary to comply with and meet the requirements of this Order. *See Personhuballah*, 155 F. Supp. 3d at 563 (discussing Supreme Court precedent and concluding that in remedying a violation, the only districts which should be changed are those that are "require[d]" to be changed). Any such decisions shall be explained in his report. Otherwise, he shall draw his own plans using the criteria set forth herein.

4. The Special Master is authorized to hire research and technical assistants and advisors reasonably necessary to facilitate his work, who shall be reasonably compensated by the State of North Carolina in the same way as the Special Master. He is authorized to buy any specialized software reasonably necessary to facilitate his work.

5. To facilitate the consideration of incumbency authorized by Paragraph 2(g), the parties shall confer and, no later than November 8, 2017, shall file a Joint Submission identifying incumbents covered by Paragraph 2(g) by name, address, and date first elected.

6. Upon request from the Special Master, the parties shall promptly make available to the Special Master electronic copies of trial and hearing transcripts, trial exhibits, motions, briefs, and evidentiary material otherwise submitted to the Court. Such a request shall be communicated by way of an email message to counsel of record for all parties.

7. The parties, including the North Carolina Legislative Analysis Division, shall promptly respond to the best of their ability to any reasonable request by the Special Master for supporting data or information as is reasonably necessary to carry out his assignment. All such requests and responses shall be made by email, with all counsel copied. Upon such a request, the requested party shall respond promptly to the best of its ability. The Special Master may, but is not required to, request briefs on such background matters as he would find helpful. The Special Master is not authorized to take new evidence, absent request to do so and approval from the Court.

8. The Special Master may, but is not required to, convene the parties for a discussion about logistics, software, data, and other housekeeping or technical issues, including whether it would or might save time or other resources to use computers, software, data, or other facilities and

materials controlled by the State and to have technical assistance from a support person employed by the State in the use of such materials. He may convene such a discussion upon reasonable notice at a time and place and in a method convenient to him, though if an in-person meeting or hearing is convened it shall occur in North Carolina. He shall advise the parties of the time and other details by way of an email message to counsel of record for all parties.

9. If the Special Master determines that it would save time and otherwise facilitate prompt completion of his work to use state technical resources and so long as the parties consent to such use under terms which would not give the State advance or ex parte knowledge of the Special Master's work and which would prevent the State from accessing such work or communicating with its support employee about such work, the Court will entertain a request to supplement this Order.

10. If time permits and the Special Master would find it helpful, he may publicly release preliminary maps or plans and convene a hearing, meeting, or informal conference to evaluate whether the preliminary maps meet the criteria set forth herein or raise unanticipated problems. The Special Master shall advise the parties of the time and other details by way of an email message to counsel of

record for all parties and shall file notice with the court. A transcript shall be prepared of any such hearing, meeting, or conference, and, if it does not occur in open court, be made available on the Court's docket.

11. The Special Master is prohibited from engaging in any ex parte communication with the parties or their counsel, except as specifically authorized by this Order.

12. The Special Master is prohibited from discussing this matter with anyone else, other than assistants or advisors he retains to complete his work, except as specifically authorized by this Order. Any assistants or advisors retained by the Special Master may discuss the matter only with the Special Master.

13. The Special Master may communicate ex parte with the Clerk of Court, the Clerk's staff, and the Court about housekeeping, scheduling, and logistical matters. If necessary to clarify or supplement these instructions, the Special Master may communicate ex parte with the Court, provided he promptly advises the parties that the communication has occurred and discloses any material guidance he has received.

14. Pursuant to Rule 53(b)(2)(C), the Special Master shall maintain orderly files consisting of all documents submitted to him by the parties and any written orders,

findings, and recommendations. All other materials relating to the Special Master's work should be preserved until relieved of this obligation by the court. The Special Master shall preserve all datasets used in the formulation of redistricting plans, and any drafts considered but not recommended to the court, in their native format.

15. The Special Master's final report shall contain:

    a. At least one recommended redistricting plan for each Subject District;

    b. For each county or county grouping encompassing a Subject District, a color map showing the recommended remedial plan;

    c. For each Subject District, an analysis (i) explaining the proposed remedial plan and the recommendation of that plan over the 2017 Enacted Districts or the Plaintiffs' proposed districts; (ii) covering any matters required elsewhere in this Order; and (iii) discussing any criteria, issues, or questions which the Special Master believes may arise or which will otherwise aid the Court;

    d. A comparison of the Special Master's districts with the related 2011 and 2017 Enacted Districts as to

population deviations; compactness; county, municipal, and precinct splits; incumbency pairing; Black Voting Age Population; and any other relevant criteria; and

e. A "stat pack" for the recommended plans.

16. If any party believes the report should contain additional information, it shall meet and confer with other parties and thereafter file an appropriate request no later than November 6, 2017. In lieu of a brief in support, the request shall be accompanied by a Joint Submission including the positions of all parties so that responses will not be needed.

17. The Special Master shall file his report electronically on the Court's CM/ECF system. The Legislative Defendants shall promptly post the Special Master's report and supporting electronic files to its redistricting website.

18. The Court will review the report pursuant to Fed. R . Civ. P. 53(f).

19. If any party or non-party believes that one or more proposed districts set forth in the Special Master's report is legally unacceptable or otherwise should not be adopted, specific objections must be filed within five business days. Any response must be filed within three business days. Briefs are limited to 5000 words. Reply briefs !imited to 2500 words may thereafter

be filed within two business days. The Court anticipates scheduling a hearing on the report in early January 2018. Fed. R. Civ. P. 53(f)(1).

20. The Court understands the candidate filing period to be from February 12 to February 28, 2018. Doc. 162-1. If that is or becomes incorrect, the Defendant State Board of Elections shall immediately advise the Court.

21. The Court may modify this order pursuant to Federal Rule of Civil Procedure 53(b)(4). The parties may seek to modify this order for good cause shown, but no such motion shall be filed without meeting and conferring in person with all other counsel. Absent agreement, the time to respond to such a motion is two business days and no reply will be permitted.

Entered by the Court, this the 1st day of November, 2017.

[handwritten: signature]
FOR THE COURT

Appendix C

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 1:15-CV-399

SANDRA LITTLE COVINGTON, et al.,
Plaintiffs,
v.
THE STATE OF NORTH CAROLINA, et al.,
Defendants.

January 23, 2018

NOTICE OF APPEAL

Defendants Robert A. Rucho, David R. Lewis, Philip E. Berger, and Timothy K. Moore ("legislative defendants") in the above-captioned action hereby give notice of their appeal to the Supreme Court of the United States from the Memorandum Opinion and Order (Amended) [D.E. 242] entered by the Court on January 21, 2018.

This appeal is taken under 28 U.S.C. § 1253.

Respectfully submitted this 23rd day of January, 2018.

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Appendix D

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.C. Const. art. II, §5 Representative districts; apportionment of Representatives.

The Representatives shall be elected from districts. The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the representative districts and the apportionment of Representatives among those districts, subject to the following requirements:

1. Each Representative shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Representative represents being determined for this purpose by dividing the population of the district that he represents by the number of Representatives apportioned to that district;
2. Each representative district shall at all times consist of contiguous territory;

3. No county shall be divided in the formation of a representative district;
4. When established, the representative districts and the apportionment of Representatives shall remain unaltered until the return of another decennial census of population taken by order of Congress.

No. 17-1364

IN THE
Supreme Court of the United States

STATE OF NORTH CAROLINA, *ET AL.*,
Appellants,
v.
SANDRA LITTLE COVINGTON, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

MOTION TO AFFIRM

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RESTATEMENT OF QUESTIONS PRESENTED

A three-judge district court unanimously concluded that the North Carolina General Assembly racially gerrymandered 28 state-legislative districts. This Court summarily affirmed that holding and remanded for remedial proceedings. In accordance with this Court's precedents, the district court gave the General Assembly the first opportunity to draw new districting plans and then reviewed those plans to ensure that they in fact remedied the constitutional violations. They did not. The district court found that the General Assembly perpetuated the racial gerrymandering in four districts and exceeded the scope of the Court's remedial order by unnecessarily redrawing five additional districts despite the State Constitution's prohibition on districting more than once per decade.

The questions presented are:

1. Did the district court lack jurisdiction to ensure that the State adopted constitutionally adequate districting plans to remedy the most extensive racial gerrymander in our Nation's history?

2. Did the district court clearly err when it found that the plans adopted by the General Assembly failed to remedy the racial gerrymandering in four districts, based on extensive factual findings—uncontested here—that these districts partook too much of the constitutional infirmities of their predecessor districts?

3. Did the district court abuse its equitable discretion in imposing a remedial plan that cured the federal constitutional violations while also respecting state policy as enshrined in the State Constitution?

TABLE OF CONTENTS

RESTATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF FACTS 4

A. The Initial Remedial Proceedings 5

B. The Remedial Proceedings on Remand 6

REASONS FOR GRANTING THE MOTION 12

I. The District Court Had Jurisdiction Over The Remedial Proceedings And Was Not Required To Give The General Assembly Unlimited Attempts To Remedy Its Constitutional Violations 13

A. The district court had jurisdiction to review whether the 2017 Plans actually remedied the racial gerrymandering in the 2011 Plans. 13

B. The district court was not required to give the General Assembly an unlimited number of chances to fix its constitutional violations. 18

II. The District Court Correctly Found That The General Assembly Perpetuated Racial Gerrymandering In Four Districts And Properly Imposed A Remedy 20

A. The district court did not clearly err in holding that the 2017 Plans failed to remedy racial gerrymandering in four districts. 21

B. The district court properly remedied the four racially gerrymandered districts at issue. 26

III. The District Court Did Not Abuse Its Equitable Discretion In Refusing To Order A Remedy That Violated The State Constitution. 28

A. The General Assembly's authority to redistrict was constrained by the district court's prior order. 28

B. There are no Eleventh Amendment or standing impediments to the district court's remedial order 31

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Abbott v. Perez, 138 S. Ct. 49 (2017) 26

Abrams v. Johnson, 521 U.S. 74 (1997) 21, 22

Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015) 25

Bethune-Hill v. Virginia State Board of Elections, 137 S. Ct. 788 (2017) 25, 27

Branch v. Smith, 538 U.S. 254 (2003) 32

Chapman v. Meier, 420 U.S. 1 (1975) 15

City of Port Arthur v. United States, 459 U.S. 159 (1982) 24

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 27-28

Commissioners of Granville County v. Ballard, 69 N.C. 18 (1873) 29

Connor v. Finch, 431 U.S. 407 (1977) 31

Cooper v. Harris, 137 S. Ct. 1455 (2017) 8, 21

Covington v. North Carolina, 316 F.R.D. 117 (M.D.N.C. 2016) 4, 8, 21

Ely v. Klahr, 403 U.S. 108 (1971) 16

Graves v. Barnes, 446 F. Supp. 560 (W.D. Tex. 1977), *judgment summarily aff'd sub nom. Briscoe v. Escalante*, 435 U.S. 901 (1978) 14-15

Growe v. Emison, 507 U.S. 25 (1993) 16, 19, 31

Hunt v. Cromartie, 526 U.S. 541 (1999) 16

Hunter v. Underwood, 471 U.S. 222 (1985) 24

Jeffers v. Clinton, 740 F. Supp. 585 (E.D. Ark. 1990) 14

Johnson v. Miller, 922 F. Supp. 1556 (S.D. Ga. 1995), *judgment aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997) 23

Knox v. Service Employees International Union, Local 1000, 567 U.S. 298 (2012) 14

Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *summarily aff'd*, 542 U.S. 947 (2004) 14

Miller v. Johnson, 515 U.S. 900 (1995) 22, 24, 25

Missouri v. Jenkins, 515 U.S. 70 (1995) 25

North Carolina v. Covington, 137 S. Ct. 1624 (2017) 6

North Carolina v. Covington, 137 S. Ct. 2211 (2017) 6

North Carolina v. Covington, 138 S. Ct. 974 (2018) 12

Peacock v. Thomas, 516 U.S. 349 (1996) 18

Pender County v. Bartlett, 649 S.E.2d 364 (N.C. 2007), *judgment aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009) 29

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 32, 33

Perry v. Perez, 565 U.S. 388 (2012) 31

Reynolds v. Sims, 377 U.S. 533 (1964) 3, 14, 15, 19, 31

Riggs v. Johnson County, 73 U.S. 166 (1867) 18

Salazar v. Buono, 599 U.S. 700 (2010) 33

Scott v. Germano, 381 U.S. 407 (1965) 14

Shaw v. Hunt, 517 U.S. 899 (1996) 16, 25

Shaw v. Reno, 509 U.S. 630 (1993) 25

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 27

System Federation No. 91, Railway Employees Department v. Wright, 364 U.S. 642 (1961) 30

United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961) 4

United States v. Hays, 515 U.S. 737 (1995) 33

Upham v. Seamon, 456 U.S. 37 (1982) 31, 32

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 24

Whitcomb v. Chavis, 403 U.S. 124 (1971) 30, 31

White v. Weiser, 412 U.S. 783 (1973) 31

Wise v. Lipscomb, 437 U.S. 535 (1978) 19, 32

STATUTES

N.C. Const. art. II, § 5(4) 11, 29

OTHER AUTHORITIES

Brief of State Appellants, *Hunt v. Cromartie*, 526 U.S. 541 (1999) (No. 98-85), 1998 WL 792301 17

Deposition of Thomas Hofeller 246:10-247:3, *League of Women Voters of North Carolina v. Rucho*, No. 1:16-cv-1164 (M.D.N.C. Jan. 24, 2017), ECF No. 99-34 8

Order, *North Carolina State Conference of NAACP Branches v. Lewis*, No. 18 CVS 00232 (N.C. Super. Ct. Apr. 13, 2018) 12, 29

INTRODUCTION

Almost a year ago, this Court summarily affirmed the unanimous finding of a three-judge court that the North Carolina General Assembly had perpetrated the most extensive racial gerrymander in our Nation's history. On remand, the district court gave the General Assembly an opportunity to adopt new districting plans to remedy the 28 districts held to be unconstitutional.

The General Assembly was not up to the task. The district court found, again unanimously, that the General Assembly perpetuated the racial gerrymandering in four districts—two in the Senate map and two in the House map. In addition, the General Assembly gratuitously redrew five House districts that had neither been held unlawful nor bordered a district held unlawful, thus exceeding the scope of the court's injunctive order and violating the State Constitution's prohibition on districting more than once per decade.

With election deadlines looming, the district court adopted a lawful plan drawn by a special master that fully remedied the racial-gerrymandering violations while also complying with all applicable state laws and policies. In doing so, the district court achieved exactly the balance this Court has mandated between respecting a state's redistricting choices and ensuring compliance with the federal Constitution. Appellants now argue that the district court had no power to do any of this, but their arguments lack support in this Court's precedents and would yield absurd results.

First, Appellants advance a radical theory of jurisdiction in redistricting cases. According to Appellants, a state found to have an unconstitutional districting plan can moot the case and strip a three-judge

court of jurisdiction simply by *enacting* a substitute "remedial" plan, regardless of whether that plan actually remedies anything at all. That theory is absurd on its face. It would follow that a state can moot a racial-gerrymandering case in the remedial phase by repealing the offending plan and re-enacting the *exact same plan*. Appellants' jurisdictional theory is so obviously wrong that they themselves took the opposite position in their previous submissions to the district court. They were right the first time.

Alternatively, Appellants argue that the district court should have given them yet another chance to adopt an adequate remedial plan. Appellants are wrong on both the law and the equities. The district court gave Appellants a reasonable opportunity to enact remedial House and Senate plans—more than a year, in fact—and Appellants squandered it. With election deadlines rapidly approaching, and facing the prospect of a *fourth* election under unconstitutional plans, the district court properly ordered judicial relief.

Second, Appellants claim that their substitute plans were an adequate remedy for racial gerrymandering simply because they did not consider racial data in drawing the new districts. Rather than contesting any of the district court's detailed factual findings about the various infirmities in the four districts at issue, Appellants instead argue that the districts are immune from review because the very same map-drawer who created the 28 racially gerrymandered districts in the first place was supposedly race-blind when drawing the substitute districts. Once again, Appellants' theory reduces to absurdity. If Appellants are right, then states can remedy a racial gerrymander just by

unchecking a box in their redistricting software and then re-enacting *the exact same plan* all over again.

This Court's precedents do not countenance such schemes. The harm caused by racial gerrymandering does not reside in legislators' hearts or heads. The harm subsists in the way legislators have divided the people of their state. Those divisions—and the pernicious messages they send to citizens and elected officials—do not go away until the state removes them. Any plan that fails to do that is not a real remedy. Here, the district court found that Appellants failed to enact a real remedy and instead acted to preserve as much of their racial gerrymandering as possible. Appellants do not challenge the district court's factual findings about the many ways in which the four remedial districts at issue perpetuated the prior racial gerrymanders; and in any event, those factual findings are not clearly erroneous.

Third, Appellants contend that respect for federalism means that the district court was required to implement their obvious violation of the State Constitution's ban on mid-decade redistricting. That is backwards. For decades, this Court has instructed that court-drawn plans must comport with "state constitutions insofar as is possible." *Reynolds v. Sims*, 377 U.S. 533, 584 (1964). Appellants' proposal would require district courts to ignore state constitutions altogether, which flies in the face of the very federalism principles Appellants invoke.

As Appellants would have it, there are no real remedies to be had in racial-gerrymandering cases, only (at most) decade-long sagas of futile litigation. "For the suit has been a futile exercise if the [plaintiff] proves a violation but fails to secure a remedy adequate to

redress it." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 323 (1961). If the district courts' powers to fashion equitable remedies mean anything in practice, then Appellants must be wrong on all the issues presented in their jurisdictional statement. Not only wrong, but so obviously wrong as to require no further briefing and argument before this Court. For the reasons set forth in this motion, the Court should summarily affirm.

STATEMENT OF FACTS

This Court is already familiar with the facts surrounding the 2011 state-legislative redistricting process in North Carolina. Appellants here are individual legislators in the North Carolina General Assembly, referred to as "Legislative Defendants" in the proceedings below. Appellees, plaintiffs below, are 31 registered voters in North Carolina. Although the State of North Carolina was a party below, it has not joined in Appellants' appeal.

In August 2016, a unanimous three-judge district court held that 28 districts in the General Assembly's state-legislative districting plans (the "2011 Plans") were unconstitutional racial gerrymanders. *Covington v. North Carolina*, 316 F.R.D. 117, 124 (M.D.N.C. 2016). Although the district court declined to order any remedy that would disturb the impending 2016 general election, it instructed the General Assembly to "draw remedial districts in their next legislative session to correct the constitutional deficiencies in the [2011 Plans]." *Id.* at 177. As was clear from this order, as well as the district court's many subsequent orders, the court was not requiring the State to redraw the entire map, but only

the 28 "unconstitutional districts." ECF No. 140 at 2.[1] The Court enjoined the State from holding any further elections until constitutional plans were in place and explicitly "retain[ed] jurisdiction to enter such orders as may be necessary to enforce this Judgment and to timely remedy the constitutional violations." ECF No. 125 at 2.

A. The Initial Remedial Proceedings

Because the district court did not issue its opinion until shortly before the 2016 general election, those elections were held using unconstitutional maps, and numerous members of the General Assembly were elected from racially gerrymandered districts in November 2016 (as they had been in 2012 and 2014). Appellees sought to correct this injustice by asking the district court to order the State to hold special elections under constitutional maps in 2017. ECF No. 132.

Appellants strongly opposed the motion, but they never questioned the district court's continuing jurisdiction over the remedial proceedings. In fact, Appellants themselves proposed the very form of the remedial proceedings to which they now object. In their briefing below, Appellants proposed to submit a remedial plan to the district court by May 1, 2017. ECF No. 136 at 17. Appellees then would have 7 days to raise any objections to those plans, and Appellants would have a chance to respond. *Id.* Appellants assured the district court that, under this schedule, "the Court would have time to review and rule upon any objections by plaintiffs in time to allow the Board of Elections . . . to conduct special elections in November 2017." *Id.*

---

[1] All ECF citations are to docket number 1:15-cv-0399 in the United States District Court for the Middle District of North Carolina.

The district court granted Appellees' motion for additional relief and ordered the State to conduct special elections under new maps, giving the General Assembly until March 15, 2017 to enact remedial plans. ECF No. 140. Appellants sought and were granted a stay pending appeal, and this Court later vacated the special elections order. *North Carolina v. Covington*, 137 S. Ct. 1624 (2017) (per curiam). However, the Court summarily affirmed the district court's ruling on the merits. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017) (mem.). The Court remanded for further remedial proceedings.

B. The Remedial Proceedings on Remand

On remand, the district court invited the parties to submit their positions on an appropriate timeline for the General Assembly to adopt new districting plans and whether additional relief was warranted. ECF No. 153 at 3-4. In their position statement, Appellants acknowledged that the court had "ordered the North Carolina General Assembly *to enact remedial districts . . . to correct the constitutional deficiencies in the 2011 enacted plans*." ECF No. 161 at 6, 31-32 (emphasis added). Appellants likewise acknowledged the district court's jurisdiction to review those plans before implementing them. *See id.* at 29 (proposing a schedule that "would leave time for this Court's review and implementation of the plans in an orderly way in 2018"); *id.* at 31 ("This schedule would also permit the Court to review the plans prior to their implementation for the 2018 election cycle.").

In July 2017, after considering the parties' positions, the district court declined to order special elections. ECF No. 180 at 4. However, the court also declined to

give Appellants an extra four months to adopt remedial plans, citing three reasons.

First, Appellants had already had almost a year to enact remedial plans, and they had made little or no effort to do so. In the district court's words, "[t]he General Assembly's failure to comply with this Court's August 2016 Order or to take any apparent action since the Supreme Court unanimously affirmed this Court's judgment tends to indicate that the General Assembly does not appreciate the need to move promptly to cure the unconstitutional racial gerrymanders." *Id.* at 7.

Second, given the limited scope of the district court's initial order, there was no need to give the General Assembly several more months to comply. As the district court observed, "[n]ot all districts need to be redrawn." *Id.* at 6.

Third, the district court expressed its concern that Appellants' proposed timeline would not leave enough time for the district court to review the remedial plan and, "if the enacted plans prove constitutionally deficient, to draw and impose its own remedial plan." *Id.* at 7.

Accordingly, the district court ordered Appellants to "enact new House and Senate districting plans remedying the constitutional deficiencies with the Subject Districts" by September 1, 2017 (though the court offered to extend that deadline by two weeks on Appellants' motion). *Id.* at 8.

The General Assembly finally convened in August 2017. The redistricting committees appointed Dr. Thomas Hofeller to draw the remedial plans, even though he was the same person who had drawn the

racially gerrymandered districts in the 2011 Plans. *See* J.S. App. 9. His process in 2011 involved the creation of racial exemplar districts—drawn solely on the basis of race—which were then modified slightly to create the districts in the 2011 Plans. J.S. App. 5; *Covington*, 316 F.R.D at 136-37.

As a result of this experience, Dr. Hofeller was so familiar with the racial demographics of the State that, by his own testimony in another case, he did not even need to consult racial data to understand the racial effects of his districting choices. *See* Dep. of Thomas Hofeller 246:10-247:3, *League of Women Voters of N.C. v. Rucho*, No. 1:16-cv-1164 (M.D.N.C. Jan. 24, 2017), ECF No. 99-34. While Appellants instructed Dr. Hofeller that he was not to consult racial data in drawing the remedial districts, they also instructed him to protect incumbents elected under the racially gerrymandered 2011 Plans as much as possible, J.S. App. 10-11, even incumbents who had publicly announced their decision not to seek re-election, J.S. App. 61 n.7. Appellants further instructed Dr. Hofeller to consult political and election results data, *id.* at 11, in a state where it is well known that "race and party affiliation" are "highly correlated," *Cooper v. Harris*, 137 S. Ct. 1455, 1486 (2017) (Alito, J., concurring in the judgment in part and dissenting in part) (internal quotation marks omitted).

Dr. Hofeller then proceeded with redrawing the 28 racially gerrymandered districts. For reasons Appellants have never explained, J.S. App. 69, the General Assembly also decided to redraw five House districts in Wake and Mecklenburg Counties that had nothing to do with the racial gerrymander: House District (HD) 36, HD 37, HD 40, HD 41, and HD 105. J.S.

App. 67. When the draft House plan was revealed, Appellees' counsel sent the Redistricting Committees a letter explaining that redrawing these districts clearly violated the State Constitution's ban on mid-decade redistricting. J.S. App. 13. But the General Assembly proceeded to adopt these plans anyway.

Appellants submitted their remedial plans (the "2017 Plans") to the district court on September 7, 2017. ECF No. 184. This was more than a year after the district court first ordered that the unconstitutional districts would need to be redrawn. One week later, Appellees submitted their objections to the nine districts at issue in this appeal—following the exact procedure Appellants previously had suggested. ECF No. 187. Appellees raised two objections. *First*, Appellees argued that the 2017 Plans perpetuated the racial gerrymandering in Senate District (SD) 21, SD 28, HD 21, and HD 57. *Id.* at 20. *Second*, Appellees objected to the gratuitous redrawing of HD 36, HD 37, HD 40, HD 41, and HD 105 as exceeding the scope of the district court's remedial order and simultaneously violating the North Carolina Constitution's ban on mid-decade redistricting. *Id.* at 33-42. In response to these objections, Appellants for the first time argued that the case was now moot because the General Assembly had enacted substitute plans and the district court lacked jurisdiction even to review the 2017 Plans. ECF No. 192 at 20 n.4.

After reviewing the parties' submissions and evaluating the relevant evidence, the district court informed the parties that it had "serious concerns" that the 2017 Plans perpetuated the racial gerrymanders in SD 21, SD 28, HD 21, and HD 57. J.S. App. 103. The district court also had serious concerns that the General

Assembly had "exceeded the authorization to redistrict provided in the Court's previous orders," *id.*, by redrawing the five House districts in Wake and Mecklenburg Counties that were not among or abutting any of the 28 districts at issue in the case.

Recognizing that time was of the essence, and that "[c]onstitutionally adequate districts must be in place in time for the 2018 election," J.S. App. 104, the district court appointed Dr. Nathaniel Persily of Stanford University as Special Master to draw alternative plans for these nine districts for the court to consider. J.S. App. 2. The court issued detailed instructions to Dr. Persily on how to proceed, including that he "comply with North Carolina constitutional requirements" to the extent that such requirements were not inconsistent with federal law, and that he consider racial data only "to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders and otherwise complies with federal law." J.S. App. 16-20, 80-81.

After reviewing the 2017 Plans and the Special Master's recommended plans, the district court concluded that the 2017 Plans failed to cure the racial gerrymandering in SD 21, SD 28, HD 21, and HD 57. J.S. App. 2-3, 50-66. The district court based its conclusions on extensive findings of fact regarding the shape and composition of these districts, along with the process used to draw them. The district court found that the 2017 versions of these districts continued to divide communities on racial lines in much the same manner as their 2011 counterparts and continued to perform poorly on compactness measures. *See* J.S. App. 50-66. Most notably, the district court found that each of these districts closely resembled Dr. Hofeller's 2011 exemplar districts, which were drawn solely on the basis of race.

J.S. App. 54, 55-56, 59-60, 64. Based on these findings, the district court concluded that the 2017 versions of these four districts "partake too much of the infirmity" of their 2011 counterparts and that General Assembly had "validate[d] the very maneuvers that were a major cause of the unconstitutional districting." J.S. App. 48, 61 (quotation marks omitted).

In contrast, the district court found that the Special Master's plan remedied the racial gerrymanders in SD 21, SD 28, HD 21, and HD 57 "by not tracking the contours of their racially gerrymandered versions, and not dividing municipalities and counties along racial lines." J.S. App. 79. The district court also found that the Special Master's recommended plans were more compact than the 2017 Plans and split fewer precincts and municipalities. J.S. App. 79, 90-100.

Regarding the five House districts in Wake and Mecklenburg Counties, the district court found that the redrawing exceeded the scope of its order to remedy the 28 racially gerrymandered districts. J.S. App. 69. As the district court observed, Appellants "did not put forward any evidence showing that revising *any* of the [five House districts] was necessary." *Id.* (emphasis in original). Because there was no need for the General Assembly to alter the boundaries of these five districts, the redrawing exceeded the scope of the remedial order and clearly violated the State Constitution's ban on mid-decade redistricting, which provides that House districts, once established, "shall remain unaltered until the return of another decennial census of population taken by order of Congress." N.C. Const. art. II, § 5(4); J.S. App. 69-70.

In adopting the Special Master's plan to cure the four racially gerrymandered districts, therefore, the court declined to implement the General Assembly's alterations to the five additional House districts in Wake and Mecklenburg Counties. Instead, the district court's remedial plan restored those districts to their configurations under the original, legislatively enacted 2011 House Plan. J.S. App. 97-99.

Appellants filed an emergency motion to stay the court's order, *see* ECF No. 243, and an emergency stay application in this Court, *North Carolina v. Covington*, No. 17A790 (U.S. Jan. 24, 2018). This Court declined to stay the district court's order with respect to the remedy imposed to redress the constitutional violations in the four racially gerrymandered districts, but the Court granted the stay "insofar as it directs the revision of House districts in Wake County and Mecklenburg County."[2] 138 S. Ct. 974 (2018).

REASONS FOR GRANTING THE MOTION

Appellants fail to raise any substantial issues that require further briefing and argument before this Court. Instead, they ask this Court to adopt radical theories about federal courts' jurisdiction and remedial powers. These theories are completely at odds with this Court's

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[2] After this Court's ruling on Appellants' stay application, a group of plaintiffs filed a complaint in state court seeking to enjoin the State from using the new House districts in Wake County. Order at 1, *N.C. State Conference of NAACP Branches v. Lewis*, No. 18 CVS 00232 (N.C. Super. Ct. Apr. 13, 2018). The state trial court ruled on April 13, 2018, that although plaintiffs were likely to succeed on the merits of their claim that the General Assembly violated the State Constitution, *id.* at 2, the court would nonetheless deny the preliminary injunction because voting was already underway in Wake County. *Id.* at 2-3.

precedents and quickly reduce to absurdities. The Court should therefore summarily affirm the district court's remedial order.

I. The District Court Had Jurisdiction Over The Remedial Proceedings And Was Not Required To Give The General Assembly Unlimited Attempts To Remedy Its Constitutional Violations.

Appellants' first argument is that the district court "improperly retained jurisdiction over a moot controversy" after the General Assembly "repealed and replaced" the 2011 Plans. J.S. 14. But that is inconsistent with decades of precedent from this Court. Similarly unfounded is the notion that the district court was required to provide the General Assembly with unlimited opportunities—even in the face of an impending election—to get its replacement plan right.

A. The district court had jurisdiction to review whether the 2017 Plans actually remedied the racial gerrymandering in the 2011 Plans.

It is axiomatic that a federal court has authority to order remedies when it finds a constitutional violation, and to ensure that those remedies adequately redress the violation. Appellants cannot credibly dispute that point, so they attempt to fashion a new rule for the remedial phase of redistricting cases. According to Appellants, the only remedy required when unconstitutional districts are struck down is the enactment of new districts. In their view, it does not matter if the new districts actually remedy the constitutional violation. That they exist is enough, and that serves to moot the case and rob the district court of further jurisdiction. Appellants' vision of the remedial phase of redistricting cases would render a liability

finding meaningless and dangle relief beyond the reach of plaintiffs who have proven an unconstitutional racial gerrymander.

Courts routinely retain jurisdiction over remedial proceedings to ensure that their orders are adequately carried out. *See, e.g., Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307-08 (2012) (noting that, following a final judgment on the merits, there was "still a live controversy as to the adequacy" of the remedy, and that respondent was "not entitled to dictate unilaterally the manner in which" it complied with the court's order). This is particularly true in redistricting cases, in which this Court has regularly approved of the district court's retention of jurisdiction. For example, in *Reynolds*, this Court regarded as "commendable" the district court's retention of jurisdiction to afford the "provisionally reapportioned legislature an opportunity to act effectively" before implementing the court's own plan to remedy a one-person-one vote violation. *Id.* at 586-87; *see also, e.g., Scott v. Germano*, 381 U.S. 407, 409-10 (1965) (instructing the district court to "retain jurisdiction of the case and in the event a valid reapportionment plan . . . is not timely adopted" to "enter such orders as it deems appropriate, including an order for valid reapportionment plan").[3] Like so many

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[3] *See also Larios v. Cox*, 300 F. Supp. 2d 1320, 1356-57 (N.D. Ga. 2004) (three-judge court) (retaining jurisdiction "to permit the Georgia General Assembly to submit to the court . . . enacted plans for reapportionment"), *summarily aff'd*, 542 U.S. 947 (2004); *Jeffers v. Clinton*, 740 F. Supp. 585, 602 (E.D. Ark. 1990) (three-judge court) (retaining jurisdiction "as a matter of inherent equitable power" to review the legislature's subsequent apportionment before it could go into effect); *Graves v. Barnes*, 446 F. Supp. 560, 562, 571 (W.D. Tex. 1977) (three-judge court) (per curiam) (exercising the jurisdiction it had retained to implement a new,

district courts before it, the court below exercised its equitable powers to retain jurisdiction "to enter such orders as may be necessary to enforce [its] Judgment and to timely remedy the constitutional violation." ECF No. 140 at 2. That exercise of jurisdiction was proper.

In Appellants' crabbed view of the district court's jurisdiction, the court is there only to enact a remedial plan if the legislature fails to do so. J.S. 14. But that view relies on a misreading of *Reynolds* and its progeny. In *Reynolds*, this Court charged the district court with monitoring the legislature's response not just for its timing, but also for its constitutionality. As this Court stated, "judicial relief becomes appropriate" whenever a "legislature fails to reapportion *according to federal constitutional requisites* in a timely fashion after having had an adequate opportunity to do so." 377 U.S. at 586 (emphasis added).

Similarly, in *Chapman v. Meier*, 420 U.S. 1 (1975), this Court noted that the legislature's charge during the remedial phase is not simply to adopt a plan, but to "enact a *constitutionally acceptable* plan." *Id.* at 27 (emphasis added). And if the legislature "fails in that task, the responsibility falls on the District Court and it should proceed with dispatch to resolve this seemingly interminable problem." *Id.* If the district court's only duty in the remedial phase is to watch the clock to ensure a timely response, this Court's references to

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constitutionally compliant redistricting scheme and noting that such action was "obligatory, both as a matter of constitutional principle, and as the product of the exercise of [the court's] equitable discretion"), *judgment summarily aff'd sub nom. Briscoe v. Escalante*, 435 U.S. 901 (1978).

constitutional "requisites" and "acceptability" would make no sense.

This Court has never strayed from its holdings in *Reynolds* and *Chapman* that the district court has jurisdiction to review the constitutional adequacy of a remedial plan. Indeed, as this Court has stated, after finding a constitutional violation, it is the district court's obligation to ensure that future "elections are held under a constitutionally adequate apportionment plan." *Ely v. Klahr*, 403 U.S. 108, 114-15 (1971). While the legislature is given the first opportunity to develop such a plan, it is the district court that must "*assess the legality of a new apportionment statute* if one is forthcoming" and "prepare its own plan . . . if the official version proves insufficient." *Id.* at 115 (emphasis added). Even when this Court has reversed or vacated a district court's decision to draw its own plan, it has never even hinted at a fundamental jurisdictional defect.

None of the cases Appellants cite are to the contrary. *Growe v. Emison*, 507 U.S. 25 (1993), addressed mootness in the context of simultaneous state and federal actions challenging the constitutionality of the same state plan. *Growe* stands for the unremarkable proposition that a federal-court challenge becomes moot when its proponents obtain the judgment they seek by prevailing on their parallel challenge in state court. *Id.* at 39. That has not happened here.

Appellants also miss the mark by relying on *Hunt v. Cromartie*, 526 U.S. 541 (1999). After this Court found a racial gerrymander and remanded for a remedy in *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*), the North Carolina General Assembly enacted a new redistricting plan and then "submitted the plan to the three-judge

court to determine whether it cured the constitutional defects in the earlier plan." Br. of State Appellants at 7, *Hunt v. Cromartie*, 526 U.S. 541 (1999) (No. 98-85), 1998 WL 792301. "In that remedial proceeding . . . the *Shaw* plaintiffs . . . were given an opportunity to litigate any constitutional challenges they might have to the [remedial] plan, which the State had enacted under the *Shaw* court's injunction. They elected not to avail themselves of that opportunity." *Id.* at 8. The district court nonetheless exercised "its authority to review the State's proposed remedial plan" and found the plan to be "an adequate remedy for the constitutional defects in the prior plan." *Id.* Subsequently, a different group of plaintiffs challenged the newly enacted plan in the lawsuit that became *Hunt v. Cromartie*. There was never any suggestion that the *Shaw* plaintiffs were required to file a new lawsuit to lodge objections to the *Shaw* remedial plan.

Finally, the cases cited by Appellants that address mootness where a state repeals or amends a statute in the normal course without any federal-court mandate are inapposite. They add nothing to this Court's analysis about the scope of a federal court's duties in the remedial phase of an ongoing racial-gerrymandering case.

This Court should recognize Appellants' jurisdictional argument for what it is: a last-ditch effort to avoid remedying racial gerrymanders that have already persisted through three election cycles. Appellants raised this argument only after it became apparent that the district court might not fully endorse the 2017 Plans. Until then, Appellants proceeded as though it was perfectly appropriate for the district court to consider whether their remedial plans actually provided a remedy. And for good reason. That position

was consistent with this Court's precedents and with fundamental principles about a court's inherent power to enforce its own orders. *See Peacock v. Thomas*, 516 U.S. 349, 356 (1996); *Riggs v. Johnson Cty.*, 73 U.S. 166, 187 (1867) ("[T]he jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied.").

Appellants' newly minted argument would strip the district court of power to enforce its order. It would render a district court's finding that a state has racially gerrymandered its maps a victory for the plaintiffs in name only. And it would force successful plaintiffs to start from scratch with a new claim or suit, even if they never received a remedy for the suit they already won. This Court should summarily reject Appellants' argument and the absurd results it would produce.

B. The district court was not required to give the General Assembly an unlimited number of chances to fix its constitutional violations.

In the alternative, Appellants contend that the district court should have given the General Assembly another opportunity to enact an adequate remedy once it found the 2017 Plans constitutionally inadequate. J.S. 31. According to Appellants, as long as the General Assembly remained "ready and willing" to cure the remaining defects in the remedial plans, the General Assembly was entitled to try again. J.S. 33. This theory runs headlong into established precedent constraining a state's role in proposing remedies to its own federal constitutional violations.

As this Court recognized decades ago in *Reynolds*, once a district court finds that a districting plan is unconstitutional, it generally should give the legislature

"an opportunity to remedy" the unconstitutional plan. 377 U.S. at 586; *see also Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (state legislatures should receive "a reasonable opportunity . . . to meet constitutional requirements by adopting a substitute measure" where "practicable"). But the legislature's opportunity to remedy an unconstitutional districting plan is just that—an opportunity. If the legislature squanders that opportunity by failing to "reapportion according to federal constitutional requisites in a timely fashion," then "judicial relief becomes appropriate." *Reynolds*, 377 U.S. at 586. Appellants have not cited any case supporting the proposition that legislators are entitled to try as many times as they like to achieve constitutional redistricting plans.

Contrary to Appellants' claim that this case is "virtually indistinguishable" from *Growe*, J.S. 14, it is completely distinguishable. As discussed above, *Growe* involved parallel state and federal challenges to the same districts. This Court addressed "the propriety of the District Court's pursuing reapportionment of Minnesota's state legislative and federal congressional districts in the face of Minnesota state-court litigation seeking similar relief." *Growe*, 507 U.S. at 27. It held that the district court overstepped because it obstructed remedial proceedings in state court, which had already reached the merits on similar claims and was diligently working toward issuing remedial maps. Because the state court did not "fail timely to perform that duty," the federal district court jumped the gun. *Id.* at 34.

This case is nothing like *Growe*. There is no parallel state action seeking to remedy these four racially gerrymandered districts, and the district court did not interrupt any state-court remedial proceedings. The

General Assembly received a reasonable opportunity and a generous amount of time to fix its unconstitutional maps. Under this Court's precedents, the General Assembly was entitled to nothing more.

In addition to being wrong on the law, Appellants are also wrong on the equities. Their failure to produce an adequate remedy raised the specter that voters would have to endure a *fourth* general election under unconstitutional districts. The district court correctly judged that this was unacceptable and that "[c]onstitutionally adequate districts must be in place in time for the 2018 election." ECF No. 206 at 3. The filing period for the 2018 general elections began on February 12, 2018, just over a month after the court's hearing on the 2017 Plans. ECF No. 248 at 16. With yet another general election fast approaching, there was no reason to expect that sending Appellants back to the drawing board would result in a timely remedy. Federal courts are not required to engage in endless back-and-forth with a state legislature just because it professes to be "ready and willing" to try again. The standard that Appellants propose is yet another transparent attempt to curb the district courts' power to right constitutional wrongs.

II. The District Court Correctly Found That The General Assembly Perpetuated Racial Gerrymandering In Four Districts And Properly Imposed A Remedy.

The district court's factual findings that the 2017 Plans perpetuated the unconstitutional racial gerrymandering in SD 21, SD 28, HD 21, and HD 57 were eminently plausible on the extensive record before the district court. Its unanimous conclusion thus easily

"clears the bar of clear error review." *Harris*, 137 S. Ct. at 1478. And the district court acted well within its equitable discretion by adopting the Special Master's recommendations to remedy the racial gerrymandering the General Assembly had perpetuated in four districts.

A. The district court did not clearly err in holding that the 2017 Plans failed to remedy racial gerrymandering in four districts.

Appellants do not dispute a single factual finding below about the four districts at issue here. Appellants do not contest the district court's findings about their shape, composition, or substantial similarity to their 2011 counterparts. Appellants do not disagree that the districts maintain the core constituencies they had under the 2011 Plans, continue to divide counties and municipalities on racial lines in much the same manner, and continue to perform poorly on compactness measures. Appellants do not contest that the four districts closely track Dr. Hofeller's exemplar districts, which were drawn in 2011 for the sole purpose of hitting mechanical racial targets. *Covington*, 316 F.R.D. at 135-37. Indeed, HD 57 took on the shape of one of Dr. Hofeller's exemplars, and SD 28 looks *more* like Dr. Hofeller's exemplar in the 2017 Plan than it did in the 2011 Plan. J.S. App. 55-56, 64.

In short, Appellants do not and cannot dispute that the four districts "share[] many of the constitutional defects" of their predecessors. *Abrams v. Johnson*, 521 U.S. 74, 88 (1997). Because Appellants have not disputed or rebutted any of these factual findings, they cannot seriously contend that "the court below's view is clearly wrong." *Harris*, 137 S. Ct. at 1468.

Once plaintiffs show—as Appellees have already done in this case—that a state has impermissibly divided them into districts on the basis of race, they are entitled to relief that undoes those divisions. So long as those divisions remain enshrined in a state's legislative maps, the injury persists, and the plaintiffs have not received a true remedy. In this respect, the Court's decision in *Abrams v. Johnson* is particularly instructive. In *Abrams*, the district court found that Georgia's Eleventh Congressional District, enacted as part of a 1992 plan, was racially gerrymandered. This Court affirmed the district court's judgment and remanded the case for further proceedings. *Miller v. Johnson*, 515 U.S. 900, 928 (1995). On remand, the legislative defendants "proposed a variety of plans," including one that the Georgia Legislature had passed in 1991. *Abrams*, 521 U.S. at 83. The district court declined to adopt this plan because it "closely resembled the Eleventh District in the [challenged] plan" and thus "shared many of the constitutional defects" as the challenged plan. *Id.* at 83, 88. The racial predominance in the challenged plan and the close resemblance it bore to the 1991 Plan made both plans "improper departure points" at the remedial phase. *Id.* at 90. The district court therefore adopted its own plan that cured the racial gerrymandering. *Id.* at 84. This Court affirmed the district court's remedial order on appeal. *Id.* at 101.

This case requires the same result. After "extensive fact finding," including "a district-specific analysis to determine whether each district's configuration carried forward the constitutional violation, considering a variety of statistical data and testimony," the district court unanimously concluded that the four districts at issue "'partake too much of the infirmity' of their racial

gerrymandered versions" to remedy the constitutional violation. J.S. App. at 48. Nothing more is required in the remedial phase. Indeed, the district court's findings in this case are far more robust than the findings this Court affirmed in *Abrams*. *See Johnson v. Miller*, 922 F. Supp. 1556, 1563 n.9 (S.D. Ga. 1995) (three-judge court), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997).

Instead of trying to show that the district court's findings were clearly wrong, Appellants argue that the 2017 Plans must be an adequate remedy as a matter of law because the map-drawer, Dr. Hofeller, supposedly did not consider racial data. J.S. 20-25. As an initial matter, Appellants' claim that Dr. Hofeller did not consider race when drawing the 2017 Plans because he did not consult racial data is dubious at best. Dr. Hofeller drew the racial gerrymanders in the 2011 Plans, and he has testified in another redistricting case that he was so familiar with the racial demographics of North Carolina that he did not need to consult racial data to understand the racial effects of his choices. Moreover, he was instructed to protect incumbents elected under the racially gerrymandered districts and to consider political data, which is closely correlated with racial data in North Carolina. *See supra* at 8.

But even setting all of those facts aside, Appellants' legal argument is fatally flawed. Under Appellants' logic, the General Assembly could have cured its constitutional violations by re-enacting the *exact same plans* based on a manufactured record that eschewed consideration of racial data. J.S. App. at 49. Appellants cannot launder the unconstitutional districts in this manner or undo the injury of racial gerrymandering simply by claiming to ignore racial data while enacting

substantially the same plans. That would not accomplish the basic purpose of a *remedial* plan, and it cannot be what it means to give plaintiffs meaningful relief for a serious equal-protection violation. It is therefore unsurprising that Appellants have offered no precedent for this radical position.

This Court has long recognized, as the district court explained, that a "statute enacted by a state legislature to remedy an unconstitutional race-based election law can perpetuate the effects of the constitutional violation, and thereby fail to constitute a legally acceptable remedy, *even when the remedial law is facially race-neutral.*" J.S. App. 47 (citing *Lane v. Wilson*, 307 U.S. 268 (1939); *Guinn v. United States*, 238 U.S. 347 (1915) (emphasis added)). If the "original enactment was motivated by" invidious discriminatory intent and it "continues to this day to have that effect," it violates equal protection. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985); *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1977).

Moreover, a putative remedy does not escape review simply because there is no *direct* evidence that the legislature considered race. A court can also look to "circumstantial evidence of a district's shape and demographics," *Miller*, 515 U.S. at 916, to scrutinize whether the district still perpetuates racial segregation. That is exactly what the district court did here. Furthermore, against the backdrop of "prior findings of discriminatory purpose," it is reasonable for a district court to adopt remedies that "hedge against the possibility that the [proposed remedial] scheme contain[s] a purposefully discriminatory element." *City of Port Arthur v. United States*, 459 U.S. 159, 168 (1982).

Racial gerrymandering injures voters by classifying and separating them into districts on the basis of race. *Shaw v. Reno*, 509 U.S. 630, 649 (1993); *Miller*, 515 U.S. at 911. The harms of racial gerrymandering include not only being personally subjected to a racial classification, but also "being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quotation marks omitted); *see also Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015).

As this Court has previously held, an equitable remedy for a constitutional violation must be *remedial* in nature, "that is, it must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) (internal quotation marks omitted)). And the same principle applies to racial-gerrymandering cases. *See Shaw II*, 517 U.S. at 915. It follows that a new plan is not an adequate remedy if it divides voters in substantially the same manner as its unconstitutional predecessor and continues to place them in districts represented by incumbents elected on the theory that their primary obligation is to represent the members of only one racial group.

The General Assembly was under an obligation to "enact new House and Senate districting plans remedying the constitutional deficiencies with the Subject Districts." ECF No. 180 at 8. Rather than curing those deficiencies and the injuries they inflicted, the General Assembly perpetuated them. The district

court's factual findings on this score are unchallenged and should be summarily affirmed.[4]

B. The district court properly remedied the four racially gerrymandered districts at issue.

This district court did not abuse its equitable discretion when it adopted the Special Master's recommendation for remedying the four racially gerrymandered districts. The court properly ordered judicial relief, *see supra* at 18-26, and properly allowed the Special Master to consider racial data to the extent necessary to cure the racial gerrymanders.

Appellants insinuate that the Special Master used the district court's permission to consider race to the extent necessary as license to consider race as a predominant motive. J.S. 34-35. On their telling, the Special Master simply manipulated the maps to achieve his desired black voting age population ("BVAP") in each district. Not so. Appellants neglect to mention (much less dispute) the district court's factual finding that the Special Master did not seek or achieve racial targets in formulating his recommended plans. J.S. App. 81-84. The district court also credited the Special Master's eminently reasonable explanation for the BVAP changes: replacing racially gerrymandering districts with districts that comply with traditional districting principles often decreases BVAP. J.S. App. 84. The district court found that reductions in BVAP "fail[] to demonstrate that the Special Master engaged in racial targeting." *Id.* Appellants' rank speculation

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[4] This Court need not hold this case in abeyance for *Abbott v. Perez*, 138 S. Ct. 49 (2017). Nothing the Court decides in *Perez* could answer any question in this case, which has nothing to do with legislative adoption of a court-imposed interim plan.

about the Special Master's secret motive cannot satisfy their burden to show clear error on the district court's part.

Appellants also gloss over the district court's extensive factual findings about the recommended districts. The district court found that the Special Master's recommended districts outperformed the 2017 Plans on several of the State's own redistricting metrics. J.S. App. 78-80, 90-97. For example, the district court found that the recommended districts were more compact and split fewer precincts, municipalities, and counties than their counterparts in the 2017 Plans. These findings undercut any suggestion that the Special Master subordinated traditional districting principles to race, and Appellants do not even try to dispute these findings.

Appellants' argument thus boils down to the contention that this Court must vacate the district court's remedy simply because the district court told the Special Master he was allowed to consider race if necessary. But as this Court has repeatedly recognized, in redistricting, the mapmaker "always is aware of race when ... draw[ing] district lines." *Bethune-Hill*, 137 S. Ct. at 797 (quoting *Shaw*, 509 U.S. at 646). And this Court has long affirmed equitable remedies for equal-protection violations that take race into account to eliminate racial classifications "root and branch." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971) (quotation marks omitted). Indeed, members of this Court have observed that a "race-conscious remed[y]... may be the *only* adequate remedy after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause." *City of Richmond v. J.A. Croson Co.*, 488 U.S.

469, 519 (1989) (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added). Far from abusing its discretion, the district court faithfully followed this Court's precedents in allowing the Special Master to consider race to the extent necessary to remedy the constitutional violations.

III. The District Court Did Not Abuse Its Equitable Discretion In Refusing To Order A Remedy That Violated The State Constitution.

Appellants again ignore the remedial nature of these proceedings in claiming that the district court erred by refusing to implement the General Assembly's violations of the State Constitution. Indeed, Appellants turn the federalism principles they invoke on their head. By implementing a remedial plan that both redressed the federal constitutional violations from the racially gerrymandered districts and respected state districting principles, the district court simply applied this Court's clear directive to ensure that court-drawn plans are highly deferential to state policies, particularly those enshrined in a state's constitution.

A. The General Assembly's authority to redistrict was constrained by the district court's prior order.

In some states, a legislature is free to redistrict as many times as it likes. Not North Carolina. The State Constitution forbids the General Assembly from altering state-legislative boundaries more than once per decade. Specifically, Article II, § 5(4) dictates that the General Assembly must redistrict after the decennial census and "[w]hen established, the representative districts and the apportionment of Representatives shall remain unaltered until the return of another decennial

census of population taken by order of Congress." N.C. Const. art. II, § 5(4). That provision is unambiguous and has been construed by the State's highest court. *See Comm'rs of Granville Cty. v. Ballard*, 69 N.C. 18 (1873).[5] This provision is binding on the General Assembly "except to the extent superseded by federal law." *Pender Cty. v. Bartlett*, 649 S.E.2d 364, 366 (N.C. 2007) (quoting *Stephenson v. Bartlett*, 562 S.E.2d 377, 389 (N.C. 2002)), *judgment aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009).

Accordingly, the General Assembly was prohibited from redrawing any House district in the 2011 Plans—the General Assembly's original legislative enactment following the decennial census—unless a court ordered that such redrawing was required to remedy a constitutional violation. Here, the district court never held that HD 36, HD 37, HD 40, HD 41, and HD 105 were unconstitutional, never held the districts abutting them unconstitutional, and never ordered them redrawn. The General Assembly was well aware of the scope of the district court's order. When it gratuitously redrew these districts, it "exceeded the authorization to redistrict provided in the Court's previous orders," J.S. App. 103, and simultaneously exceeded the authorization to redistrict provided by the State Constitution. Because there was no lawful authorization

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[5] In addition, as noted above, *supra* n.2, a different group of plaintiffs filed state-court litigation, subsequent to this Court's order on Appellants' stay application, challenging the Wake County districts redrawn in violation of Article II, Section 5. In that litigation, the state court has held that plaintiffs are likely to succeed on the merits of their challenge to the redrawing of the Wake County districts. Order at 2, *N.C. State Conference of NAACP Branches*, No. 18 CVS 00232.

for the redistricting, the General Assembly violated its constitutional obligation to leave the districts "unaltered."

Appellants could not credibly argue that the General Assembly would have been entitled to enact a new redistricting plan in 2017 absent a court order. Indeed, the district court's "order invalidating the lines surrounding the twenty-eight districts provided the sole authority for the General Assembly to ignore the North Carolina Constitution's ban on mid-decade redistricting." J.S. App. 35. The General Assembly's authority to alter district boundaries that otherwise were required to "remain unaltered" derived from the federal court's order and was thus circumscribed by it. In finding that the General Assembly exceeded the scope of the redrawing authorized by the court, the district court was not adjudicating state-law claims. It was merely enforcing its own prior injunction of the 2011 Plans. "[A]n injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *Sys. Fed'n No. 91, Ry. Emps. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961).

In evaluating whether the General Assembly complied with its order and provided an adequate remedy for the federal constitutional violation, the district court properly considered state law. This Court has made clear that when ordering and overseeing equitable relief in redistricting cases, district courts may not "brush[] aside state apportionment policy without solid constitutional or equitable grounds for doing so." *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971). In particular, a federal court in a remedial proceeding must

attempt to comply with "state constitutions insofar as is possible." *Reynolds*, 377 U.S. at 584.

These concerns about following state law to the extent possible are particularly heightened when—as here—a federal court must adopt a plan of its own to remedy the constitutional violation. *See Upham v. Seamon*, 456 U.S. 37, 42 (1982); *White v. Weiser*, 412 U.S. 783, 793-97 (1973); *Chavis*, 403 U.S. at 160-61. Here, the district court had to assume the "unwelcome obligation," *Connor v. Finch*, 431 U.S. 407, 415 (1977), of crafting a remedial map because the legislature failed to remedy its racial gerrymandering in four districts. In doing so, the district court demonstrated the utmost respect for principles of federalism and the primacy of state actors and state policies in the redistricting process. *See, e.g.*, *Growe*, 507 U.S. at 34.

By imposing a remedial map that restored the five House districts in Wake and Mecklenburg Counties to their original configuration in the 2011 legislatively enacted plan, the district court ensured the implementation of a remedy that "accommodate[d] the relief ordered to the apportionment provisions of [the] state constitution[] insofar as possible." *Reynolds*, 377 U.S. at 584; *see also Perry v. Perez*, 565 U.S. 388, 392-94 (2012) (instructing a court drawing a remedial plan to modify the state's enacted plan as narrowly as possible). That is exactly what this Court's precedents have required.

B. There are no Eleventh Amendment or standing impediments to the district court's remedial order.

Appellants contend that "[t]he Eleventh Amendment forbids federal courts from enjoining state

laws on state-law grounds," J.S. at 28. But that is beside the point. As discussed above, the district court was not enjoining state laws on state-law grounds. When the district court concluded that the 2017 Plans failed to fix the racial gerrymandering and exceeded the scope of the court's prior order, the court was required to implement its own remedy. That remedy was subject to "stringent standard[s]," including compliance with the State Constitution. *See Wise*, 437 U.S. at 541; *Upham*, 456 U.S. at 43-44. Deference to state redistricting requirements—including and especially those set out in a state's constitution—is not only permissible, but required by this Court.

Appellants' invocation of *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) is thus inapposite. As Justice Scalia wrote for the plurality in *Branch v. Smith*, 538 U.S. 254 (2003): There is "no conflict with *Pennhurst*" where a "federal court grant[s] relief on the basis of federal law" while also "defer[ring] to the State's 'policies and preferences' for redistricting." 538 U.S. at 278 n.* (plurality) (citation omitted). That includes state policies expressed in a state's constitution. *Id.* at 278. Indeed, "[f]ar from intruding on state sovereignty, such deference respects it." *Id.* at 278 n.*

The court below did not issue any injunction against the 2017 Plans. Rather, the court "approve[d] and adopt[ed] the State's 2017 Plans, as modified by the Special Master's Recommended Plans." J.S. App. 101. Even assuming, however, that the modification of the five districts in Wake and Mecklenburg could be construed as an injunction, there still would be no issue under *Pennhurst*. As the district court found, the 2017 Plans failed to comply with *federal* law and exceeded the

authority to redistrict provided by a *federal* court order. Because there were federal grounds sufficient to justify any injunction, *Pennhurst* has no bearing. It is settled law that a federal district court is empowered to enjoin state action and enactments on federal-law grounds. *See Pennhurst*, 465 U.S. at 105. There is therefore no conceivable Eleventh Amendment problem with the district court's equitable remedy.

For similar reasons, Appellants' arguments on standing are unavailing. If this were a newly filed action alleging racial gerrymandering, Appellants could indeed argue that "individuals do not have standing to challenge districts in which they don't reside." J.S. 26; *see United States v. Hays*, 515 U.S. 737, 738-39 (1995). However, these are not new legal challenges for which plaintiffs must assert independent standing; they are objections made in the course of a remedial proceeding.

Appellees obtained a favorable judgment and retained an interest in ensuring that they received the relief to which they were entitled. In such circumstances, a party always has standing. As this Court has stated, "[a] party that obtains a judgment in its favor acquires a 'judicially cognizable interest in ensuring compliance with that judgment . . . . The standing inquiry . . . turns on the alleged injury that prompted the plaintiff to invoke the court's jurisdiction in the first place." *Salazar v. Buono*, 559 U.S. 700, 712-13 (2010). Appellants' argument is therefore "not an argument about standing but about the merits of the District Court's order." *Id.* at 713. For the same reasons noted above, Appellants' standing arguments fail.

In sum, the district court acted well within its equitable discretion in imposing remedial plans that

redressed the federal violations while respecting state policy. The Court should summarily affirm.

CONCLUSION

The motion to affirm should be granted.

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In the
Supreme Court of the United States

STATE OF NORTH CAROLINA, *et al.*,
Appellants,

v.

SANDRA LITTLE COVINGTON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF OPPOSING MOTION TO AFFIRM

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May 15, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. Challenges To Legislatively Enacted "Remedial" Plans Are Not Exempt From The Ordinary Rules Of Adversarial Litigation 2

II. The District Court Erred By Invalidating Four Districts As Racial Gerrymanders 6

A. The District Court Applied the Wrong Legal Standard 6

B. There Is No Evidence That the General Assembly Was Motivated by Race 8

III. The District Court Lacked Jurisdiction Over Plaintiffs' State-Law Challenges 10

IV. The District Court Improperly Prevented The State From Enacting A Remedial Map 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Abrams v. Johnson,
521 U.S. 74 (1997) 4

Bartlett v. Strickland,
556 U.S. 1 (2009) 10

Chapman v. Meier,
420 U.S. 1 (1975) 4

City of Mobile v. Bolden,
446 U.S. 55 (1980) 7

Growe v. Emison,
507 U.S. 25 (1993) 4, 5

Hainsworth v. Martin,
382 U.S. 109 (1965) 5

Hunt v. Cromartie,
526 U.S. 541 (1999) 3, 5

Lawyer v. Dep't of Justice,
521 U.S. 567 (1997) 12

League of United Latin Am. Citizens v. Perry,
548 U.S. 399 (2006) 3, 12

Louisiana v. Hays,
518 U.S. 1014 (1996) 5

Miller v. Johnson,
515 U.S. 900 (1995) 3, 10

Palmer v. Thompson,
403 U.S. 217 (1971) 7

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,
551 U.S. 701 (2007) 8

Perry v. Perez,
565 U.S. 388 (2012) 3

Reynolds v. Sims,
377 U.S. 533 (1964) 4

Scott v. Germano,
381 U.S. 407 (1965) 4

Washington v. Davis,
426 U.S. 229 (1976) 7

White v. Regester,
422 U.S. 935 (1975) 5

Wise v. Lipscomb,
437 U.S. 535 (1978) 2, 3, 4

Other Authorities

Br. for United States, *Abbott v. Perez*,
Nos. 17-586 & 17-626 (U.S.) 7

Richard H. Pildes, *Expressive Harms, "Bizarre Districts," and Voting Rights*,
92 Mich. L. Rev. 483 (1993) 9

INTRODUCTION

Plaintiffs cannot explain how the North Carolina General Assembly could have engaged in racial gerrymandering by declining to consider race when enacting the 2017 Plan. Instead, their entire defense of the decision below hinges on the notion that the ordinary procedural and substantive rules of litigation do not apply to their challenges to that duly enacted law because it was evaluated as a part of a "remedial proceeding." According to plaintiffs, courts need not worry about mootness, standing, or sovereign immunity, and courts can invalidate districts as racial gerrymanders even if—or, indeed, precisely because—the legislature did not consider race, so long as they do all of that pursuant to their power to "remedy" an earlier racial gerrymander.

That theory defies law, logic, and the fundamentals of the legislative and judicial processes. While district courts have different obligations when imposing their *own* remedial maps, they do not have some special reservoir of remedial power that allows them to ignore basic Article III requirements or subject duly enacted laws to some ad hoc "preclearance" process in which the normal presumption of constitutionality is reversed. Instead, when a State repeals a judicially invalidated map and replaces it with another duly enacted law, the second law is entitled to the same presumption of constitutionality as any other legislation, and can be invalidated only if a plaintiff with standing proves that it violates the Constitution or the VRA. Whatever else may be said of the complex web of restrictions that those two sources of federal law weave, one thing is for

certain: A legislature cannot engage in racial gerrymandering by declining to district on the basis of race. The district court's contrary conclusion cannot stand.

I. Challenges To Legislatively Enacted "Remedial" Plans Are Not Exempt From The Ordinary Rules Of Adversarial Litigation.

Plaintiffs do not even try to reconcile the district court's decision with the normal procedural and substantive rules that govern challenges to districting legislation. Instead, they argue that those settled rules do not apply here because the court was conducting a "remedial proceeding." *See, e.g.*, Mot.2, 13, 17, 23. In their view, because the district court was reviewing a plan enacted to replace a plan found deficient, the court did not have to abide by racial-gerrymandering jurisprudence, the Eleventh Amendment, or even the constraints of Article III. Plaintiffs are deeply mistaken. They have conflated the judicial role when a federal court must draw districts because the state legislature has failed to act, with the very different judicial role when a state legislature enacts a new plan into law. In the latter circumstance, there is no excuse for deviating from the normal requirements of Article III or the ordinary presumption of constitutionality.

In the rare circumstance when "those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so," the court may be forced to take on the "unwelcome obligation" of designing a districting plan. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (principal opinion). And in that circumstance, the court may

treat an unenacted proposal from the legislature as a mere proposal, because that is all it is. In the absence of a timely enacted new law, the court has no choice but to draw its own map and has an independent obligation to ensure that its map complies with applicable law. *See Perry v. Perez*, 565 U.S. 388, 393-94 (2012).

But where, as here, the State enacts a new plan, the district court cannot treat that duly enacted law as a mere proposal. Nor does the court have the power to subject that duly enacted legislation to a kind of "preclearance," freed from the presumption of constitutionality and unconstrained by the rules of adversarial litigation. Instead, the "new legislative plan" takes immediate effect and becomes "the governing law unless it, too, is challenged and found to violate the Constitution." *Wise*, 437 U.S. at 540. Such a challenge is subject to the ordinary constraints on the Article III process and "the presumption of good faith that must be accorded legislative enactments." *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

That is clear from this Court's cases. This Court has explained, for example, that "state legislatures are free to replace court-mandated remedial plans by enacting redistricting plans of their own." *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 416 (2006) (Kennedy, J.). If the new plan is challenged, "no presumption of impropriety" attaches to the new plan, and the court's task is the same as in any racial-gerrymandering case: to determine whether the legislature was predominantly motivated by race. *Id.*; *see, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541 (1999). Indeed, the rule that courts must "afford a

reasonable opportunity for the legislature to ... adopt[] a substitute measure," *Wise*, 437 U.S. at 539, would be meaningless if second-round plans were not entitled to the same presumptions of good faith and constitutionality as first-round plans.

Proving the point, this Court has never approved the application of different rules to challenges to *legislatively* enacted "remedial" plans. Instead, this Court has applied distinct "remedial" principles *only* when a court was (or was likely to be) forced to draw its *own* plan. Indeed, the principal case on which plaintiffs rely (at 22) for their remedial-proceedings-are-different theory is one in which the legislature "could not reach agreement" on a second-round plan. *Abrams v. Johnson*, 521 U.S. 74, 78 (1997). Likewise, while plaintiffs contend that this Court "has regularly approved of the district court's retention of jurisdiction" to review remedial plans, Mot.14, the cases they cite all involve legislative default. *See Chapman v. Meier*, 420 U.S. 1, 27 (1975) (instructing court to retain jurisdiction in case legislature "fails" to act); *Scott v. Germano*, 381 U.S. 407, 409 (1965) (instructing court to retain jurisdiction in case legislative plan "is not timely adopted"); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) (commending court for imposing plan after legislature "failed to act").

Plaintiffs also fail to distinguish cases recognizing that the enactment of a new plan moots challenges to the repealed plan. Plaintiffs note (at 16) that *Growe v. Emison*, 507 U.S. 25 (1993), involved "simultaneous state and federal actions," but that quirk has nothing to do with the relevant point: When the new plan "became the law," challenges to the old plan "became

moot." *Id.* at 35, 39. Plaintiffs do not even try to square their theory with *Hunt v. Cromartie*, instead discussing what a district court in a different case did three years earlier, Mot.17. Whatever that court did, this Court made clear in *Cromartie* that a new (and non-contingent) plan moots challenges to the old one. 526 U.S. at 545 n.1; *see Louisiana v. Hays*, 518 U.S. 1014 (1996); *White v. Regester*, 422 U.S. 935 (1975); *Hainsworth v. Martin*, 382 U.S. 109 (1965).

Plaintiffs insist that requiring them to litigate their challenges to the 2017 Plan the same way they must litigate any other constitutional challenge would "dangle relief beyond the[ir] reach." Mot.14. But that just underscores the basic flaw in their position. Plaintiffs have already gotten complete relief for the only claims they ever proved: The legislature repealed the plan they challenged and enacted a new one. Plaintiffs' belief that repeal of the only law they properly challenged is not a "true remedy" is fundamentally incompatible not only with bedrock mootness principles, but with the equally bedrock rule that *all* legislative enactments—even "remedial" ones—are entitled to a strong presumption of constitutionality. Requiring plaintiffs to overcome that presumption and prove their case in the ordinary course does not make the 2017 Plan "immune from review." Mot.2. It just ensures that duly enacted legislation will be invalidated only if it is actually unconstitutional.

II. The District Court Erred By Invalidating Four Districts As Racial Gerrymanders.

A. The District Court Applied the Wrong Legal Standard.

It is little surprise that plaintiffs adamantly refused to litigate their challenges to the 2017 Plan under the ordinary rules: They did not and cannot prove that the 2017 General Assembly engaged in racial gerrymandering. Indeed, while plaintiffs emphasize the district court's factual findings, that court did not make the one finding essential to a racial gerrymandering claim—namely, that race was the legislature's predominant motive.

Instead of looking for (let alone finding) that presumptively improper motive, the district court disapproved the challenged districts because the legislature purportedly did not "eliminate[] the discriminatory *effects* of the racial gerrymander" in the *2011* Plan. JS.App.38-39 (emphasis added). To state that oxymoronic theory is to refute it. Racial gerrymandering is an *intent*-based claim, grounded in impermissible consideration of race. Accordingly, the best way to "eliminate" the 2011 law's "discriminatory effects" is to repeal it, which is just what the legislature did. Of course, the 2017 law could turn out to be a racial gerrymander too—but that intent-based challenge would turn not on effects, but on whether the 2017 legislature acted with an impermissible racial purpose.

Plaintiffs resist this proposition, warning that if invalidation of a second-round plan requires a new finding of racial purpose, "the General Assembly could have cured its constitutional violations by re-enacting

the exact same plans" for a non-discriminatory reason. Mot.23. But that is not an anomaly; it is just how discriminatory-*intent* claims work: "[A] law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976). Because the plaintiff's injury flows from the prior legislature's discriminatory intent, the injury is remedied once that law is repealed and a new legislature enacts a new plan without discriminatory intent, as the legislature did here. *See* JS21-23; *Palmer v. Thompson*, 403 U.S. 217, 225 (1971); Br. for United States 32-35, *Abbott v. Perez*, Nos. 17-586 & 17-626 (U.S.).

To be sure, a State cannot "undo the injury of racial gerrymandering simply by *claiming* to ignore racial data while enacting substantially the same plans." Mot.23-24 (emphasis added). A legislature that only *claims* to ignore race, but is predominantly motivated by race, would violate the Constitution if it lacked sufficient justification for using race. But the "ultimate question" in any racial-gerrymandering case—even one challenging a second-round plan—is "whether a discriminatory intent has been proved in [that] given case." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion). The district court did not even ask that question, let alone find that the General Assembly was predominantly motivated by race. To the contrary, the court acknowledged that the 2017 General Assembly *did not consider race at all.*

That should have ended the matter, as the legislature obviously could not engage in racial gerrymandering by declining to consider race. Yet the court nonetheless faulted the legislature for failing to

examine the racial impact of its *non-racial* districting criteria, JS.App.49-50—in other words, for failing to (re)district on the basis of race. That just highlights the profound dangers of the court's eliminate-the-effects conception of how to cure racial gerrymanders. The district court's "cure" is indistinguishable from the disease. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).[1]

B. There Is No Evidence That the General Assembly Was Motivated by Race.

Instead of meaningfully addressing the fatal *legal* flaws in the district court's analysis, plaintiffs urge this Court to defer to the district court's *factual* findings. But there are no relevant findings, as the district court acknowledged that the legislature did not consider race in drawing the 2017 Plan. In all events, plaintiffs' argument rests on brazen mischaracterizations of the 2017 Plan.

By plaintiffs' telling, the 2017 Plan is a carbon copy of the 2011 Plan, cutting through communities on racial lines and ignoring traditional principles. In reality, the 2017 Plan outscores the 2011 Plan on every districting metric. The four challenged districts in the 2011 Plan divided 88 VTDs and 21 municipal boundaries. Those numbers decreased dramatically in the 2017 Plan to just *seven* VTDs and 14 municipal boundaries. ECF 220 at 24, 29. The Special Master's Plan divides two VTDs and 12 municipal boundaries in those four districts, but "the total number of split

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[1] As noted, JS25 n.2, the Court may wish to hold this case pending *Abbott v. Perez*, Nos. 17-586 & 17-626, which also concerns how to remedy intentional discrimination.

precincts in the Special Master's Plan is higher than the Enacted 2017 Plans." *Id.* at 23.

The compactness scores tell a similar story. The challenged districts in the 2011 Plan averaged a 0.29 Reock score and a 0.11 Polsby-Popper score. *Id.* at 26. The 2017 Plan improved those scores materially to 0.37 and 0.21. *See* Richard H. Pildes, *Expressive Harms, "Bizarre Districts," and Voting Rights*, 92 Mich. L. Rev. 483, 564 (1993) (defining "low" scores as 0.15 and 0.05). The Special Master's Plan scored marginally higher, at 0.51 and 0.32, but only at the cost of pairing two incumbents in SD28. ECF 220 at 26, 35.[2]

Indeed, the only significant difference between the 2017 Plan and the Special Master's Plan is the BVAP in each challenged district. In the 2017 Plan—drawn *without* consideration of race—the BVAPs range from 42.3% to 60.8%. In the Special Master's Plan—drawn under a court order expressly allowing the use of "data identifying the race of individuals"—the BVAPs fall within the much tighter range of 38.4% to 43.6%. JS24-25, 34-35.[3] That range just so happens

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[2] Plaintiffs assert that the four districts "closely track" the "exemplar" districts, Mot.21, but a comparison of the maps easily disproves that assertion for SD21, HD21, and HD57. *Compare* ECF 33-26 *with* ECF 220. While the 2017 SD28 overlaps with exemplar SD28, so does the Special Master's version, as all three contain "the center of Guilford County." JS.App.55, 92.

[3] Ironically, by rejecting a race-neutral legislative plan in favor of instructing the Special Master to consider race as necessary to "remedy" the "effects" of past gerrymandering, the court virtually ensured that race would be the predominant factor in the 2017 districts without justification, a result this Court's precedents

to be precisely the range favored by the plaintiffs and by prior Democratic-controlled General Assemblies, as it is the range that creates crossover districts in North Carolina. *See Strickland*, 556 U.S. at 13. Thus, it is not "rank speculation," Mot.26, but a simple matter of math that the court replaced the General Assembly's race-neutral plan with one that was meaningfully different only in that it achieved plaintiffs' race-based districting preferences.

III. The District Court Lacked Jurisdiction Over Plaintiffs' State-Law Challenges.

Plaintiffs' defenses of the district court's state-law rulings are meritless. Plaintiffs concede that they do not live in the challenged districts, but assert that standing is irrelevant because "these ... are objections made in the course of a remedial proceeding." Mot.33. But as already explained, Article III standing is not a technicality that becomes optional in proceedings deemed "remedial," and the 2017 Plan is a duly enacted law that must be challenged by a plaintiff with standing, just like any other law. If plaintiffs never brought a legal challenge to the 2017 Plan, then the district court exceeded its Article III authority, as federal courts do not have freestanding power to assess the legality of state legislation. *See* JS27. If plaintiffs *did* bring a legal challenge, they concededly lacked standing to bring their state-law claims. Either way, the court's order cannot stand.

As to the Eleventh Amendment, plaintiffs concede that federal courts may not enjoin state laws on state-

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foreclose. *Miller*, 515 U.S. at 912; *Bartlett v. Strickland*, 556 U.S. 1 (2009) (racial quotas suspect even below 50%).

law grounds, Mot.31-32, but argue that the district court "was not adjudicating any state-law claims," and ruled only that "the General Assembly exceeded the scope of the redrawing authorized by the court." Mot.30. That is wrong at every level. The district court had no authority to limit the General Assembly's power; the legislature was entirely free to repeal and replace the invalidated law, and it would be a revolution in federalism to conclude otherwise. And, in all events, the district court itself observed: "[W]e sustain Plaintiffs' *state-law objections*." JS.App.77 (emphasis added). Even more implausibly, plaintiffs argue that the district court "did not issue any injunction." Mot.32. In reality, the court prohibited North Carolina from conducting elections under the 2017 Plan and ordered it to conduct elections under the Special Master's Plan instead. That is a straightforward injunction, and the district court plainly lacked power to enter it.

IV. The District Court Improperly Prevented The State From Enacting A Remedial Map.

Even assuming there were some defect with the 2017 Plan, the district court independently erred by depriving the General Assembly of the chance to remedy it by enacting a new law. Plaintiffs assert that giving the State that chance would "run[] headlong into established precedent," Mot.18, but they identify no such precedent. They cite *Wise* and *Reynolds*, but *Wise* did not address the question (the second-round plan was not invalidated), and *Reynolds* actually forecloses plaintiffs' one-bite-at-the-remedial-apple rule, *see* JS32. Given this Court's repeated admonishments that a State "should be given the

opportunity to make its own redistricting decisions," *Lawyer v. Dep't of Justice*, 521 U.S. 567, 576 (1997), the burden is on plaintiffs to show that this settled principle evaporates after the first replacement plan. They have not met that burden.

Plaintiffs suggest there was not enough time for the legislature to enact a new plan, Mot.20, but the only reason the election was "fast-approaching" when the district court ruled was because it refused to act expeditiously based on its misconception that the legislature was "not entitled" to another chance. JS.App.106. In other words, the court *intentionally* obstructed the State from performing "one of the most significant acts a State can perform." *LULAC*, 548 U.S. at 416. At a bare minimum, this Court should vacate the Special Master's Plan and restore North Carolina's sovereign right to draw its own districts.

CONCLUSION

This Court should summarily reverse or note probable jurisdiction.

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Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

APPELLANTS' SUPPLEMENTAL BRIEF

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June 26, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
SUPPLEMENTAL BRIEF 1
CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Abbott v. Perez,
Nos. 17-586 & 17-626 (June 25, 2018) 1, 2, 3

City of Mobile v. Bolden,
446 U.S. 55 (1980)..... 2

Perry v. Perez,
565 U.S. 388 (2012)..... 5

SUPPLEMENTAL BRIEF

The racial-gerrymandering holding in this case is premised on the notion that the legislature did not do enough to "eliminate[] the discriminatory effects of the racial gerrymander" in the 2011 Plan. JS.App.38-39. That is the same theory that this Court just squarely rejected in *Abbott v. Perez*, Nos. 17-586 & 17-626 (June 25, 2018), which confirmed that a court's focus in assessing a racial-gerrymandering claim must be on the intent of the legislature that enacted the challenged plan, not the intent of the legislature that enacted the plan that it replaced. While the intent of the prior legislature may be relevant, *Abbott* confirms that it may not be used to displace the presumption of good faith or to shift the burden to the State to show the absence of taint.

The district court in this case did exactly that, concluding that the 2017 Plan was a racial gerrymander not because the General Assembly that enacted it was predominantly motivated by race, but because the General Assembly purportedly did not do enough to cure the prior plan of the taint of racial gerrymandering. Because the court's once-a-gerrymander-always-a-gerrymander logic directly contravenes *Abbott*—and because the court lacked jurisdiction to consider plaintiffs' state-law claims—the decision below cannot stand as to either their federal or their state-law claims. Indeed, plaintiffs' racial-gerrymandering claims plainly fail as a matter of law in light of *Abbott*, as it is *undisputed* that the General Assembly *did not consider race*. Because reversal or vacatur of the decision below will eliminate any extant basis for displacing the duly enacted 2017

Plan or for imposing the Special Master's Plan, moreover, this Court should provide certainty for the 2018 election cycle and make clear that the 2018 elections should be conducted under the legislatively enacted 2017 Plan.

I. In *Abbott*, this Court vacated the district court's decision holding that the Texas Legislature's 2013 districting maps failed to cure the "taint" of discriminatory intent allegedly harbored by the 2011 Legislature. The Court emphasized that the burden of proof on any claim that a state law was enacted with discriminatory intent always lies with the challenger to the law, not with the State. *Abbott*, slip op. 21. This rule, which "takes on special significance in districting cases," is not changed by a finding of past discrimination by a prior legislature. *Id.* at 21-22. No matter what came before, the "ultimate question" in any racial-gerrymandering case remains "whether a discriminatory intent has been proved in a given case." *Id.* at 22 (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980)); *see* Br. Opp. Mot. to Aff. 7. Thus, when plaintiffs claim that a districting plan was enacted with improper motive, "there can be no doubt about what matters: It is the intent of" the legislature that enacted the challenged plan. *Abbott*, slip op. 23.

This Court held that the district court there violated those precepts by requiring Texas to prove that the 2013 Legislature "cured any taint from the 2011 Plans." *Id.* at 23. While the intent of the 2011 Legislature may be relevant to the extent that it "give[s] rise to—or tend[s] to refute—inferences regarding the 2013 Legislature," the intent of the previous legislature is nothing more than "evidence"

that can be marshaled in support of—or against—an ultimate finding that the later-in-time legislature *itself* acted with an improper motive. *Id.* at 26. After holding that the Texas court applied an improper standard, this Court weighed all of the record evidence about legislative intent and concluded that it was "plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination." *Id.* at 26.

II. The Court's reasoning and holding in *Abbott* resolve the racial-gerrymandering claims in this case.[1] Just like the Texas court in *Abbott*, the North Carolina court improperly asked whether the 2017 Plan "eliminate[d] the discriminatory effects of the racial gerrymander" in the 2011 Plan, instead of whether the challenged districts in the new legislation were themselves racially gerrymandered. *See* JS22. As *Abbott* confirms, the "ultimate question" should have been whether SD21, SD28, HD21, and HD57 were themselves racial gerrymanders—*i.e.*, districts drawn on the basis of race—not whether their composition sufficiently "eliminate[d] the discriminatory effects of the racial gerrymander" in the 2011 Plan. But the district court never asked that crucial question, and certainly never found that the 2017 General Assembly was predominantly motivated by race. To the contrary, the court acknowledged that the 2017 General Assembly *did not consider race at all.* JS21-

[1] This Court need not even reach the merits of the district court's racial-gerrymandering decision because the district court improperly retained jurisdiction over a moot controversy. JS16-20. But if this Court does reach the merits, the decision in *Abbott* dictates the result of the racial-gerrymandering claims.

22. *Abbott* thus confirms that the district court erred by requiring the General Assembly to affirmatively eliminate the "effects" of the prior plan's racial gerrymander instead of simply asking whether the 2017 General Assembly itself was predominantly motivated by race—which it undisputedly was not. JS20-25.

III. Because the district court applied an improper standard and invalidated the 2017 Plan without any finding that the 2017 General Assembly acted with an improper motive, the racial-gerrymandering aspect of the decision below cannot stand. Indeed, under the correct standard, it is clear that plaintiffs not only did not, but could not meet their burden of proving that any of the challenged districts were racially gerrymandered, as it is undisputed that the 2017 General Assembly *did not consider race*. In addition, as explained in the jurisdictional statement, the district court's state-law rulings cannot stand, as the court lacked jurisdiction over plaintiffs' state-law challenges and, in all events, erred on the merits. JS25-30. The judgment below therefore must be reversed and/or vacated in its entirety, and along with it the district court's injunction requiring the State to hold the 2018 elections under the Special Master's Plan.

Indeed, once the judgment below is eliminated, there will be no longer be any basis for requiring the State to hold the 2018 elections under the Special Master's Plan, instead of the plan duly enacted by the state legislature. Without an extant ruling that the legislature's plan violates the Constitution or federal law, a federal court may not displace a legislatively

enacted plan or force a State to use a court-imposed plan. *Perry v. Perez*, 565 U.S. 388, 398 (2012). And here, the plaintiffs plainly have not met their burden of proving any infirmity in the 2017 Plan. There is thus no legal authority for a federal court to compel the people of North Carolina to hold elections under anything other than their duly enacted districting plan. This Court should provide certainty to North Carolina voters by making clear that the 2018 elections will occur under the duly enacted 2017 Plan.

Precisely because it was duly enacted by the General Assembly, returning to the 2017 Plan for the upcoming 2018 elections will cause only minimal disruption to the ongoing election process and is far preferable to holding those elections under a Special Master's map that now lacks any legal justification. In light of this Court's partial stay, the district court's decision displaced legislative districts in only three of North Carolina's 100 counties, and it affected just five of the 50 districts in the State Senate and six of the 120 districts in the State House. And in all events, the minimal disruption necessitated by undoing the district court's late-breaking and now-wholly-invalid injunction pales in comparison to the irreparable harm the State would suffer if its duly enacted districting map were displaced in the absence of any finding that it actually suffers from the constitutional infirmities plaintiffs have alleged.

CONCLUSION

This Court should reverse the district court's gerrymandering decision, vacate its state-law ruling for lack of jurisdiction, and immediately reinstate the 2017 Plan with instructions that it should govern the 2018 elections.

Respectfully submitted,

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